Argued by Mr E
Submitted by Mr E
Mr Judge Davis
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Reargued 62. 246
p 322

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~254.~~ 43 Mr Strong to write

THE TOWN OF CONCORD, PLAINTIFF IN ERROR,

vs.

THE PORTSMOUTH SAVINGS BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 15, 1873.

Reversed 5 3 Illinois 302
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p 11 vote. what is

SUPREME COURT OF THE UNITED STATES.

No 254.

THE TOWN OF CONCORD, PLAINTIFF IN ERROR,

vs.

THE PORTSMOUTH SAVINGS BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said district, on Monday, the ninth day of June, in the May term of said court, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-seventh year.

W'M H. BRADLEY, *Clerk.*

THE PORTSMOUTH SAVINGS BANK
vs.
THE TOWN OF CONCORD.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 24th day of August, A. D. 1872, said entitled plaintiff, by its attorneys, filed in the office of the clerk of said circuit court of the United States for said northern district of Illinois, at Chicago, in said district, its præcipe for a writ of summons against said entitled defendant, and also at the same time filed its bond for costs in said entitled cause, which said præcipe and bond are respectively
2 in the words and figures following, to wit:

Præcipe.

United States circuit court, northern district of Illinois.

THE PORTSMOUTH SAVINGS BANK
vs.
THE TOWN OF CONCORD. } Assumpsit.

The clerk will please issue a summons in the above-entitled suit in an action of trespass on the case upon promises, directed to the marshal*l* for the northern district of Illinois to execute—damages $4,000—and make the same returnable to the October term, 1872, of said court.

ISAAC G. WILSON,
Att'y for Plaintiff.

AUGUST 24, 1872.

(Endorsed:) Filed Aug. 24th, 1872. W'm H. Bradley, cl'k.

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 187 .

THE PORTSMOUTH SAVINGS BANK
vs.
THE TOWN OF CONCORD. } In assumpsit.

3 I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, hereby agree

and stipulate that execution may issue against my property for any costs taxed against it.

Dated this 24 day of August, A. D. 1872.

ISAAC G. WILSON.

(Endorsed:) Filed Aug. 24th, 1872. W'm H. Bradley, clerk.

On the same day, to wit, the 24th day of August, A. D. 1872, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon the town of Concord, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district
4 aforesaid, on the first Monday of October next, to answer unto the Portsmouth Savings Bank of a plea of trespass on the case upon promises, to its damage, as it is [alleged, of four thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 24th day of August, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the 97th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

I served the within writ upon the town of Concord therein named, by delivering a true copy thereof to Walter B. Simonds, clerk of said town, on the 17th day of September, A. D. 1872.

B. H. CAMPBELL,
U. S. Marshal,
By L. O. GILMAN, *Deputy.*

(Endorsed:) Filed Sept. 20th, A. D. 1872. W'm H. Bradley, clerk.

5 On this day, to wit, the 30th day of August, A. D. 1872, said plaintiff, by its attorneys, filed in said clerk's office its declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA:

In the circuit court of the United States for the northern district of Illinois, of the October term, A. D. 1872.

The Portsmouth Savings Bank, a corporation created by and doing business under and by virtue of the laws of the State of New Hamp-

shire, at Portsmouth, in the State of New Hampshire, plaintiff in this suit, by Isaac G. Wilson, its attorney, complains of the town of Concord, a municipal corporation and body politic, created by and existing under and by virtue of the township organization laws of the State of Illinois, being a town in the county of Iroquois, in said State Illinois aforesaid, defendant in this suit, which has been summoned to answer the plaintiff of a plea of trespass on the case on promises: for that, whereas the said defendant heretofore, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and seventy-two, at & within said northern district of Illinois, became and was indebted to the said plaintiff in the sum of four thousand (4,000) dollars of lawful money of the United States of America, for divers goods, wares, and merchan-
6 dise, by the said plaintiff before that time sold and delivered to the defendant and at the special instance and request of the said defendant, and being so indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, to wit, at said northern district of Illinois, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested; and whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise at the time of sale and delivery thereof, were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth
7 the further sum of four thousand (4,000) dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year and at the place aforesaid, had notice; and whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, was indebted to the said plaintiff in the further sum of four thousand (4,000) dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant; and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before that time, and then due and owing the said plaintiff, for interest upon and for the forbearance of divers other sums of money before that time, and then due and owing from said defendant to said plaintiff; and in the like sum for the price and value of work then done and material for the same provided by the plaintiff for the defendant, and at the like special request of the defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, to wit, at said northern district of Illinois, undertook, and then and there faithfully promised,
8 the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said

defendant should be thereunto afterwards requested; and whereas also the said defendant afterwards, to wit, and the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of four thousand dollars, of the like lawful money as aforesaid, and being so found in arrear and indebted to the said plaintiff, and the said defendant in consideration thereof afterwards, to wit, on the same day and year, and at the place aforesaid, to wit, at the northern district of Illinois aforesaid, undertook, and then and there faithfully promised, the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, etc.) has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the
9 same, or any part thereof, to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff four thousand (4,000) dollars, and therefore the said plaintiff brings suit, etc.

ISAAC G. WILSON,
Plaintiff's Attorney.

Copy of the account sued on.

The plaintiff's only and sole cause of action is twenty-five coupons or interest-warrants, numbered, respectively, 1 to 25 inclusive, of which the following is a true copy:

Concord Township railroad bonds.

$100.] INTEREST-WARRANT. No. [1 to 25.]

On the first day of June, 1872, the township of Concord, Iroquois County, State of Illinois, will pay to the bearer one hundred dollars, at the Mechanics' National Bank of the city of Chicago, being one year's interest on bond numbered as above.

E. D. BOONE, *Clerk.*

G. R. DUNNING, *Supervisor.*

One of said coupons is signed George R. Dunning, to wit, No. 1. Said coupons or interest-warrants are a part of twenty-five bonds, of $1,000 each, numbered, respectively, 1 to 25, a copy of one of which bonds is filed herewith.

10 *The town of Concord to Portsmouth Savings-Bank, Dr.*

To money lent and advanced	$4,000
To money paid, laid out, and expended	$4,000
To money had and received to and for the use of said plaintiff	$4,000
To goods, wares, and merchandise sold and delivered	$4,000
To labor, services, and material	$4,000
To balance due on account stated	$4,000

ISAAC G. WILSON, *Pl'ff's Att'y.*

(Endorsed:) Filed 30th August, 1872. W'm H. Bradley, clerk.

The copy of bond referred to in said declaration, and filed therewith, is in words and figures following, to wit:

(*Copy of bond.*)

No. —.] UNITED STATES OF AMERICA. [$1,000

STATE OF ILLINOIS, CONCORD TOWNSHIP RAILROAD BOND.

Know all men by these present that the township of Concord, in the county of Iroquois, and State of Illinois, acknowledges itself to owe and be indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum of money the said township of Concord promises to pay to the bearer, at the Mechanics' National Bank, Chicago, on the first day of June, in the one thousand eight hundred and eighty-one, with interest thereon at the rate of ten
11 per centum per annum, which interest shall be payable yearly, on the first day of June in each year, at the Mechanics' National Bank of the city of Chicago, upon presentation and delivery of the warrants or coupons severally hereto annexed until the payment of the said principal sum.

This bond is issued under and by virtue of a law of the State of Illinois to authorize cities, towns, or townships lying within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville and Vincennes Railroad, and the faith of said township of Concord is hereby pledged for the payment of said principal sum and interest as aforesaid.

In witness whereof the supervisor and clerk of said township of Concord have subscribed this bond this first day of June, one thousand eight hundred and seventy.

(Signed) E. D. BOONE, *Clerk.*

(Signed) GEORGE R. DUNNING, *Supervisor.*

[Stamp.]

AUDITOR'S OFFICE, ILLINOIS.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to find and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

12 In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

{ AUDITOR'S OFFICE, ILLINOIS. } C. E. LIPPINCOTT, *Auditor P. A.*

(Endorsed:) Filed Aug. 30, '72. W'm H. Bradley, clerk.

Afterwards, to wit, on the 7th day of October, A. D. 1872, said defendant, by its attorneys, filed in said clerk's office its pleas in said entitled cause, which said pleas are in words and figures following, to wit:

Pleas.

United States circuit court, northern district of Illinois.—October term, 1872.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss :

THE PORTSMOUTH SAVINGS BANK
vs.
THE TOWN OF CONCORD. } Trespass on the case on promises.

13 And the said defendant, by Monroe & Bisbee, its attorneys, comes and defends the wrong and injury when, &c., and says that it did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against it, and of this the said defendant puts itself upon the country.

By MONROE & BISBEE, *Def't's Att'ys.*

And, for a further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says actio non, because it says that the interest coupons in said declaration mentioned and the bonds to which said coupon-notes were attached are void in law, in this : that they were fraudulently issued by the supervisor and town clerk of said defendant town ; and that no authority was ever given by the voters of said town to said supervisor and town clerk to issue said bonds and coupons, and that the same were issued wholly without authority or right ; and that the plaintiff received said bonds and coupons knowing they were thus fraudulently issued ; and that the same were void and of no effect or virtue in law, and this the defendant is ready to verify ; wherefore he prays judgment if the plaintiffs ought further to have or maintain its aforesaid action thereof against this defendant.

14 And, for a further plea in this behalf, by like leave of the court here for this purpose first had and obtained, the defendant says actio non, because it says that at the time the coupon bonds mentioned in the plaintiff's declaration were issued, nor at any time before said date, there was no law of the State of Illinois that authorised said defendant town to vote to issue any bonds, or to any way aid, by municipal donation, the building of the Chiago, Danville and Vincennes Railroad, nor any other railroad that was then incorporated, nor to be incorporated, in the said State of Illinois, and, therefore, said bonds and the coupons attached thereto were and are void in law and of no effect, of which the plaintiff had notice, and this the defendant town is ready to verify ; wherefore it prays judgment if the plaintiffs ought further to have or to maintain their aforesaid action thereof against this defendant.

And, for a further plea, by like leave of the court for this purpose first had and obtained, the defendant town says actio non, because it says that said bonds and coupons in the plaintiff's declaration mentioned are void in law, in this : that, by the laws of the State of Illinois, all town meetings are required to be called ten days before the time of holding such meeting by posting notices in five public places within the corporate limits of said town at least ten days before the

15 time of holding such meeting ; and the defendant says that the

pretended meeting at which a pretended vote was taken authorizing said defendant town to vote to donate twenty-five thousand dollars to the Chicago, Danville and Vincennes Railroad Company (said vote being the only vote of said town whereby it is pretended any authority was conferred upon the supervisor and town clerk to issue said bonds mentioned in the plaintiff's said declaration) was had on the twentieth day of November, 1869, and the notices calling such meeting were posted on the 11th day of November, A. D. 1869, and at no other time, whereby said meeting was illegal and without warrant of law, and all proceedings had or votes taken at said meeting were void and of no effect, of which the plaintiffs had notice, and this the defendant town is ready to verify; wherefore it prays judgment if the plaintiffs ought further to maintain its aforesaid action thereof against said defendant town.

And, for a further plea in this behalf, by like leave of the court for this purpose first had and obtained, the defendant says actio non, because it says that the coupons and bonds mentioned in the plaintiff's declaration are void in law, in this: that the pretended vote of said town of Concord taken and had on the 20th day of November, 1869,
(and being the only vote giving any authority for the issuing of said
16 bonds and coupons in the plaintiff's declaration mentioned,) was that the said town of Concord voted to levy a tax on the taxable property of said town in the aggregate in two years to the sum of twenty-five thousand dollars to be donated to the Vincennes, Danville and Chicago Railroad Company, and it was in and by said vote expressly provided that said railroad company should construct and run said railroad through the villages of Concord and Sheldon in the county of Iroquois and State of Illinois, and the defendant says that said railroad company nor the Chicago, Danville and Vincennes Railroad Company have not constructed or run any railroad through the said villages of Concord or Sheldon, or either of them, nor has said Vincennes, Danville and Chicago Railroad Company, nor said Chicago, Danville and Vincennes Railroad Company, constructed nor run any railroad through the said town of Concord or Sheldon, nor either of said towns, by reason of which said proviso in said pretended vote and the non-compliance of said express provision by said Chicago, Danville & Vincennes Railroad Company, said vote and all proceedings had thereunder were void, and the coupons and bonds mentioned in said declaration are void and of no effect, all of which the plaintiffs had notice, and this the defendant
is ready to verify; wherefore it prays judgment if the said
17 plaintiffs ought further to have or maintain its aforesaid action thereof against said defendant town.

And, for a further plea in this behalf, by like leave of the court here for this purpose first had and obtained according to the statute in such case made and provided, the defendant says actio non, because it says that at the annual meeting of said town of Concord, legally called and holden within said town on the first Tuesday of April, 1870, and before the bonds and coupons in the said plaintiff's declaration mentioned were issued or published, it was by a majority of the legal voters of said town of Concord voted and declared that the vote taken and had on the 20th day of November, 1869, as set forth in the plea fifthly above pleaded, should be, and thereby was, rescinded and declared void and of no effect, whereby the pretended authority for the issuing of said bonds and coupons mentioned in the plaintiff's declaration was wholly rescinded, and said bonds and coupons were issued without authority and are void, of which the plaintiff's corporation had notice, and this

the defendant is ready to verify; wherefore it prays judgment if the plaintiff ought further to have or maintain its aforesaid action thereof against said defendant.

And, for a further plea in this behalf, by like leave of the court
18 for this purpose first had and obtained according to the form of the statute in such case made and provided, the defendant says actio non, because it says that the coupons and bonds in the plaintiff's declaration mentioned never were delivered by said defendant town to said Chicago, Danville & Vincennes Railroad Company nor to any one else; that said bonds were obtained by collusion, fraud, covin, & misrepresentation, and this the said plaintiff well knew, and this the defendant is ready to verify; wherefore it prays judgment if the plaintiff ought further to have or maintain its aforesaid action against this defendant.

By MONROE & BISBEE,
Def't's Att'ys.

(Endorsed:) Filed Oct. 7, 1872. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 14th day of April, in the March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

THE PORTSMOUTH SAVINGS-BANK
v.
THE TOWN OF CONCORD. } Assumpsit.

Now come the parties, by their attorneys, and, upon issue
19 joined, they waive the intervention of a jury, as per stipulation filed, and, for trial, put themselves upon the court; and, after hearing the evidence, the court, not being sufficiently advised in the premises, takes time to consider.

Afterwards, to wit, on the 6th day of June, in the May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

THE PORTSMOUTH SAVINGS-BANK
vs.
THE TOWN OF CONCORD. } Assumpsit.

The court having considered, and being now fully advised upon the matters heretofore submitted herein, finds the issue for the plaintiff, and assesses its damages to the sum of two thousand one hundred and twenty-two dollars; and thereupon the defendant, by its attorney, moves the court for a new trial herein.

Afterwards, to wit, on the 9th day of June, in the May term A. D. 1873, of said court, in the record of the proceedings thereof, in said entitled cause, appears the following entry, to wit:

THE PORTSMOUTH SAVINGS-BANK
v.
THE TOWN OF CONCORD. } Assumpsit.

Now comes the plaintiff, by his attorney, and moves for judgment herein, and it appearing to the court that the defendant had
20 had notice of this application, and the attorney of the defendant

failing to appear and urge the motion for a new trial, the same is overruled.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of two thousand one hundred and twenty two dollars, its damages so as aforesaid assessed, together with its costs in this behalf expended, amounting to the sum of sixty-two dollars and cents.

On the hearing of said entitled cause the following exceptions were taken and were allowed by the court, and made of record, and are in the words and figures following, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA:

Circuit court of the United States, northern district of Illinois.

THE PORTSMOUTH SAVINGS-BANK
v.
TOWN OF CONCORD. } Assumpsit.

Be it remembered that, on the trial of this cause before the honorable Henry W. Blodgett, without a jury, the counsel of said plaintiff read in evidence the written stipulation of the parties, the same being as follows:

Circuit court United States, northern district of Illinois.

THE PORTSMOUTH SAVINGS-BANK
vs.
TOWN OF CONCORD. } Assumpsit.

21 It is hereby stipulated that a jury be waived, and that the above-entitled suit be submitted to the court for trial and judgment without the intervention of a jury.

It is admitted, for the purpose of a trial, that at the date of the bonds of which the interest-warrants now in suit were a part, George D. Dunning was supervisor and E. D. Boon was town clerk of the said defendant, The Town of Concord; and that as such supervisor and town clerk, they signed said bonds and the interest-warrants in suit, and delivered the same to the Chicago, Danville and Vincennes Railroad Company; but nothing herein contained shall be construed as admitting directly nor indirectly that said supervisor and town clerk had been authorized by said town to execute said bonds and interest-warrants, all questions in that regard being reserved.

It is further admitted that said town of Concord lies within twenty miles of the east line of the State of Illinois, and between the city of Chicago and the southern boundary of Lawrence County.

It is further stipulated that the auditor's certificate hereto attached, marked "Exhibit A," may be admitted as competent evidence of the facts therein stated; provided the court shall hold that the facts, if proven, are competent evidence in the case.

22 It is further stipulated that all competent defences may be shown under the present pleadings in the case; and that the papers hereto attached, & marked "Exhibit B," and purporting to be copies of the town-records of the town of Concord, may be admitted as proof, tending to show the facts which they recite, subject to objection

in other respects to the competence of the evidence, and that the whole or any part of the same may be read by either party, subject to like objection. Either party reserves the right to offer, upon the trial, any other or further records of said town touching the question at issue.

It is further admitted that the county of Iroquois (of which the defendant was a town) had adopted and was organized under the township organization law of the State of Illinois at the time said bonds were issued.

It is further stipulated that either party may read the whole or any part of the testimony of Joseph E. Young, (taken by agreement of parties before Samuel Kerr, notary public, on the 14th day of February, 1873,) subject, however, to the objection of either party to its competency; that said Young was first examined by the plaintiff for convenience only, and he is to be deemed to be the witness of the party who may read his said testimony.

ISAAC G. WILSON,
Att'y for Plaintiff.
MONROE, BISBEE & GIBBS,
Att'ys for Deft.

23 Said plaintiff next offered in evidence twenty interest-warrants, numbered respectively 1 to 13, inclusive, and 19 to 25, inclusive, which said interest-warrants are severally in the words and figures following:

Concord Township railroad-bond.

$100.] INTEREST-WARRANTS. [No.

On the first day of June, 1872, the township of Concord, Iroquois County, State of Illinois, will pay to the bearer one hundred dollars, at the Mechanics' National Bank, of the city of Chicago, being one year's interest on bond numbered as above.

E. D. BOONE, *Clerk.*

G. R. DUNNING, *Supervisor.*

The plaintiff also offered in evidence the 20 bonds from which said coupons were cut, each of said bonds being in words and figures following:

UNITED STATES OF AMERICA, *State of Illinois:*

No.] CONCORD TOWNSHIP RAILROAD BOND. [$1,000

Know all men by these presents that the township of Concord, in the county of Iroquois and State of Illinois, acknowledges itself to owe and be indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum of money the said township of Concord promises to pay to the bearer at the Mechanics' National
24 Bank, Chicago, on the first day of June, in the year one thousand eight hundred and eighty-one, with interest thereon at the rate of ten per centum per annum, which interest shall be payable yearly on the first day of June, in each year, at the Mechanics' National Bank of the City of Chicago, upon presentation and delivery of the warrants or coupons severally hereto annexed, until the payment of the said principal sum.

This bond is issued under and by virtue of a law of the State of Illinois, to authorize cities, towns, or townships lying within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville and Vincennes Railroad, and the faith of said township of Concord is hereby pledged for the payment of said principal sum and interest as aforesaid.

In witness whereof the supervisor and clerk of said township of Concord have subscribed this bond this day of , one thousand eight hundred and seventy .

(Signed) E. D. BOONE, *Clerk.*

(Signed) GEORGE R. DUNNING, *Supervisor.*

The plaintiff then read in evidence sections 1, 2, and 3 of the acts of the legislature of the State of Illinois, approved March 7th, 1867, entitled "An act to authorize cities, towns, or townships lying within certain limits to appropriate monies, and levy a tax to aid the construction of the Chicago, Danville and Vincennes railroad." (Found on page 842, 1st vol., private laws of 1867.)

The plaintiff then read in evidence sections two, three, four, and five of an act of the legislature of the State of Illinois entitled "An act to enable towns, townships, cities, or counties along the line of the Chicago, Danville and Vincennes Railroad to contribute towards the construction of said railroad," approved March 24th, 1869. (Found on page 357–8, private laws 1869, vol. 3.)

Said plaintiff also read in evidence duly authenticated copies of records of the defendant town, showing the following facts, viz:

1st. That at a special meeting of the legal voters and tax-payers of the town of Concord, duly called and held, on the 20th day of November, 1869, the town voted in favor of levying a tax on the taxable property of said town of Concord, amounting, in the aggregate in two years, to the sum of twenty-five thousand dollars to be donated to the Chicago, Danville and Vincennes Railroad Company, provided the company should run its road through the villages of Concord and Sheldon, and to take such measures in pursuance of law as may be considered necessary to carry the objects of said meeting into effect.

2nd. That, on the 20th day of June, 1870, the railroad company filed, in the town clerk's office, a written notice of its acceptance of the donation, the same being addressed to the supervisor and town clerk.

3rd. That the following is a copy of the town records of the issuance of the bonds.

STATE OF ILLINOIS, *Iroquois County, ss:*

Be it remembered that, on the 9th day of October, A. D. 1871, the supervisor and town clerk of the town of Concord, in said county, in pursuance of law, proceeded to execute township bonds numbered from 1 to 25 consecutively, for $1,000 principal each, with interest coupons, ten attached to each bond of one hundred dollars each, payable yearly at ten per cent. on the principal for ten years from the first day of June, 1871, in favor of the Chicago, Danville and Vincennes Railroad Company, in consideration of said company, having run their road through the villages of Concord and Sheldon, and in accordance with the vote of Concord Township, cast on the 20th day of November, A. D. 1869, donating $25,000 in aid of said company on the conditions above stated. Said bonds delivered by me.

GEORGE R. DUNNING,
Supervisor.

EDW'D D. BOONE, *Town Clerk.*

Said plaintiff also read in evidence the deposition of James F. Shores, treasurer of Portsmouth Savings Bank, showing that the plaintiff was a bona fide purchaser in the open market for full value paid of said bonds, with said interest warrants attached, before the maturity of said coupons.

27 To the introduction of said interest-warrants and bonds in evidence said defendant objected upon the grounds: 1st. Because the date of said bonds had been altered from October 1st to June 1st, by drawing red lines across the word October, and interlining the word June in its place, and that the interest warrants had been altered by changing the figures 1 to the figure 2 so as to make the same read 1872 instead of 1871, as originally written.

2nd. Because no power or authority is shown for the issuing of the bonds in question.

And thereupon said plaintiff offered proof in explanation of said alterations and interlinations tending to show that the date of the bonds was changed from October 1st to June 1st, at the time the same were delivered to the Chicago, Danville and Vincennes Railroad Company, (to aid in the construction of whose road the plaintiff claimed the bonds were issued;) that the alteration was made in the presence and with the consent of George R. Dunning, supervisor of said defendant town, who delivered said bonds to said railroad company, the object being to make the time of the payment of the bonds and the maturity of the interest warrants coincide; that at the time of the alteration and final delivery of said bonds to said railroad company by said Dunning the com-

28 pany paid to said supervisor Dunning $725 for the accrued interest from said June 1st to the time of the delivery of the bonds, so that the full face of the interest should be due at the end of the year on the following June 1st; that the alteration in the interest warrants was made to correct a mere clerical mistake made when originally filling up said interest warrants, and was corrected long before the delivery of the bonds; that E. D. Boone, the town clerk, was not present, and had no knowledge of the erasure of the word October and the interlineation of the word June, and that said Boone and Dunning had executed the bonds some time previous to October 1st, 1871, and said bonds were delivered to said Chicago, Danville and Vincennes Railroad Company, October 17th, 1871.

The defendant also objected to said bonds as evidence on the alleged ground that they were not stamped as required by the law of Congress. The defendant, in support of his objection to the introduction of said bonds and interest warrants upon the ground of the want of authority to issue them, read in evidence against the objection of said plaintiff duly authenticated copies of the record of said defendant town, showing the following facts, viz:

29 1st. That a meeting of all legal voters and tax-payers of the town of Concord was duly called and held on the 30th day of June, 1870, the notice of which meeting was in substance as follows: "To vote for or against subscribing twenty thousand dollars to the Kankakee and Indiana Railroad Company, and rescinding the vote donating $25,000 to the C. D. V. R. R. Co., on November 20, 1869, on condition that said Kankakee and Indiana R. R. Co. run said road from La Fayette, Ind., to Kankakee, Ill., through the town of Concord, &c., and build a depot and side-track in said town, by June 30th, 1871, &c."

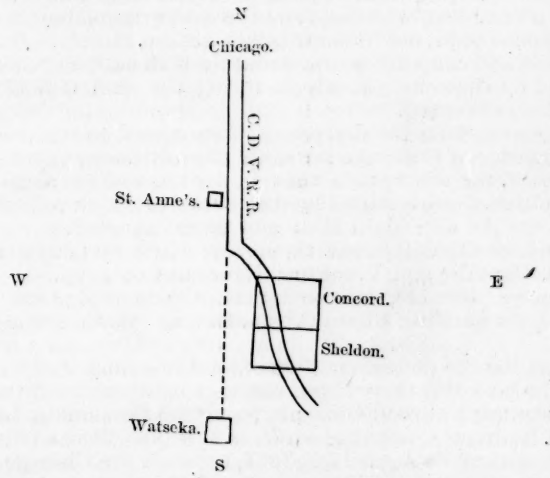
2nd. That the following is a copy of the ballot used at said meeting: "For the tax of $20,000 as subscription to the capital stock of the Kankakee and Indiana Railroad in lieu of the $25,000 voted on the 20th

day of November, 1869, to the Chicago, Danville and Vincennes Railroad, on condition that said road, depot, and side-track is completed in one year from the date of this election, in the village of Concord."

3rd. That the record of the election shows that "upon a canvass of the votes, ninety-two votes were cast for the subscription, and twenty-eight votes were cast against the same; said ninety-two votes being a clear majority of the legal votes of said township."

30 And thereupon the court overruled said defendant's objections to the introduction of said bonds and interest warrants, and the same were admitted as evidence, to which ruling and decision of the court in overruling said objections and admitting said bonds and interest warrants in evidence, the said defendants then and there excepted.

The said plaintiff also offered testimony establishing substantially the following facts, namely: That the Chicago, Danville and Vincennes Railroad Company located its line of road and obtained the right of way from the city of Chicago southerly and within the limits prescribed by its charter, passing through the towns of Concord & Sheldon, substantially according to the following diagram:



That the company graded, bridged, and furnished ties for the road through the town of Concord and Sheldon, where they made an arrangement with the Cincinnati, La Fayette and Chicago Railroad

31 Company to furnish the road and to run it in connection with the Chicago, Danville and Vincennes road to Chicago, the latter company to furnish the motive-power and rolling-stock necessary to operate the road; the gross earnings of the road to be divided between the two companies in certain specified proportions. The Chicago, Danville and Vincennes Railroad Company retained no interest in the railroad from S. Anne's to the Indiana State line, except as appears from the written contract from the Chicago, Danville & Vincennes Railroad Company, and the Cincinnati, La Fayette and Chicago Railroad Company, in evidence in this case. That the road, as thus completed, was in operation and cars running thereon at the time of the issue and delivery of the bonds in question to the Chicago, Danville and Vin

cennes road. That upon making this arrangement with the La Fayette Company, the Chicago, Danville and Vincennes Company commenced back at St. Anne's and continued its main line due south from St. Anne's, as shown by the dotted lines on said plot, along by the towns of Concord and Sheldon, at a distance of two and a half or three miles west of the town line, and at no point touching either of said towns;

32 that this action was matter of public notoriety, and known to the people and tax-payers of the towns long before the bonds were delivered, although some time after they had been made out; that the officers of the railroad company conferred with many of the citizens of said town of Concord as to the proposed new arrangement, and the people seemed to be pleased with the change, thinking it would give them a better southern connection, while the terminus north would be the same.

Upon the conclusion of plaintiff's testimony, said defendant moved the court to dismiss said cause for want of jurisdiction in the court as disclosed by the evidence, namely: "That the original holder of said bonds, the said Chicago, Danville & Vincennes Railroad Company, had its location, residence, and principal office in the State of Illinois, in the said district, at the time of the issuance of said bonds, and is now located and has its residence therein, & as the said original holder of said bonds and coupons could not maintain this action, therefore the assignee of said bonds and coupons cannot maintain such action; which motion was overruled by the court; to which ruling the said defendant then and there excepted.

33 Counsel for the defendant then moved to strike out, under the practice of the State laws, all the testimony given on behalf of the plaintiff, for the reason that it does not show a cause of action; which motion was overruled by the court; to which ruling and decision of the court the defendant then and there excepted.

Counsel for the defendant then offered in evidence the charter of the Chicago, Danville and Vincennes Railroad Company.

(Found on page 140, volume 2, private acts 1865;) also amendments providing for building a branch from Chicago south to the Indiana State line.

Counsel for the defendant then offered in evidence, against the objection of the plaintiff, the written contract between the Chicago, Danville and Vincennes Railroad Company, and the Cincinnati, La Fayette and Chicago Railroad Company, which is substantially as follows:

Agreement made April 17th, 1871, between the Chicago, Danville and Vincennes Railroad Company, party of the first part, and Cincinnati, La Fayette and Chicago Railroad Company, party of the second part, witnesseth:

First. That in consideration of the covenants herein, and the benefits expected to result therefrom, said parties have agreed with each other as follows, viz:

34 Said parties agree to form a line of connected railways for the transportation of freight and passengers between Chicago, Ill's, and La Fayette, Ind., and all intermediate points, via S't Anne's, (or near it,) Sheldon, and Templeton. The portion of the road of first party, extending from Chicago to its junction with the road of second party, near the south line of S't Anne's township, and the road of second party from said junction to La Fayette, Ind., being the line of railways hereby agreed to be formed.

Second. It is agreed that both parties shall adopt this as their route

between Chicago, La Fayette, Indianapolis, Cincinnati, and Louisville, for all business that each can control.

Third. For all business, cars should be run through between Chicago and La Fayette, each company furnishing its just proportion of rolling-stock, as herein provided.

Fourth. The second party shall construct its said road from a point on the La Fayette, Muncie and Bloomington R. R., near Templeton, in Benton Co., Indiana, to a point on the road of first party, at or near S't Anne's, Ill's, connecting at said point with the road of said first party, and after the date of such completion there shall be an interchange of business between the parties thereto.

35 Fifth. Said first party agrees to procure the right of way from said point of intersection near S't Anne's, southeasternly, to the State line between the States of Ill's and Indiana, upon the line adopted by said second party, and shall grade and bridge the road from such point of junction to said State line free of cost to said second party. It is agreed that the actual money expended by the first party for said purposes shall be refunded to it by the sale of bonds donated in aid of the road of said first party by the towns of S't Anne's, Beaver, Concord, and Sheldon, amounting to $82,000 of bonds, and the deficiency, if any, shall be repaid to said first party by said second party.

Sixth. Said first party agrees, upon the written request of second party, to furnish and loan said second party rolling-stock sufficient for the operation of the road; said second party to pay said first party a rental of 10 % per annum upon the actual cost of such rolling-stock.

Seventh. Said second party shall keep all rolling-stock so used in good repair, and in default thereof said first party may make such repairs at the cost of said second party.

Eighth. Said second party has the right to purchase such rolling-stock, (upon certain conditions.)

36 Ninth. The gross earnings arising from the business on said line shall be divided between the parties hereto, according to the relative distances of transportation over the road of each company.

Tenth. Said parties agree to adopt local freight-tariffs upon a basis of rates as now adopted by the Ill's Central R. R. Company.

Eleventh. (A provision as to the division between said parties of earnings arising from freight on certain portions of said road.)

Twelfth. (A similar provision as to the division of the earnings arising from freight on another portion of said road.)

Thirteenth. A provision as to the division of earnings from passengers on said road.)

Fourteenth. (Provision for change of rates, provided said Ill's Central R. R. Co. should change its rates.)

Fifteenth. Each party is entitled to the entire receipts from local business on its own road.

Sixteenth. Provision as to billing of freight, (and passengers.)

Seventeenth. (Provision relating principally to the continuance of this contract inviolate, under any circumstances.)

Eighteenth. The first party agrees to furnish a line of road to, and a depot in, Chicago, Ill's, without expense to said second party.

Nineteenth. The expenses of advertising the line, &c., shall be divided pro rata between the parties hereto.

37 Twentieth. Each party shall keep its own road in good repair, and be responsible for any loss arising from accident or otherwise on its own road.

Twenty-first. (Provision providing for the operations of the road of 2d party by 1st party, upon the written request of second party.)

Twenty-second. (Provision relating to payment by second party of any deficiency in earnings of its road, while operated by first party.)

Twenty-third. Provision relating to inspection of books relating to joint business of said parties.

Twenty-fourth. Provision relating to the opening of an office in Chicago by second party.

Twenty-fifth. (Provision relating to the observance of a certain agreement made between said second party and the La Fayette, Muncie and Bloomington R. R. Co.)

Twenty-sixth. The portion of the track of the La Fayette, Muncie and Bloomington R. R. Co. which may be used by said second party shall be considered a part of said second party's road for the purposes of this contract.

Twenty-seventh. This agreement to continue in force for nine hundred and ninety-nine (999) years from the date hereof.

Signed by the said parties, and the seals of each affixed thereto.

Recorded in the recorder's office of Kankakee County, Ill's, February 29th, 1872.

38 Counsel for defendant also produced several witnesses who testified against the objection of the plaintiff, that it was not the Chicago, Danville and Vincennes Railroad Company, but some other company, as they understood it, that built the railroad through the towns of Concord and Sheldon.

The court found the issues for the plaintiff, and assessed its damages at $2,122.00. To which finding and decision of the court the defendant then and there excepted.

That thereupon the defendant, by its counsel, moved for a new trial in said cause, which motion was overruled by said court, and judgment rendered upon said finding, to which defendant by his counsel then and there excepted.

And inasmuch as the foregoing matters do not appear of record, said defendant prays that this its bill of exceptions may be signed and sealed, and made a part of the record in the cause, and it is done accordingly.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed June 9th, 1873. W'm H. Bradley, cl'k.

39 Afterwards, to wit, on the 15th day of July, A. D. 1873, said defendant, by its attorneys, filed in said clerk's office its bond in said entitled cause, which said bond is in words and figures following, to wit:

Supreme Court of the United States.

PORTSMOUTH SAVINGS BANK
vs.
TOWN OF CONCORD. } Assumpsit.

Know all men by these presents that we, the town of Concord, in the county of Iroquois, in the State of Illinois, and Morris Kane, John W. Young, Ja's H. Karr, Anderson Tyler, Robert Karr, Abram Hogle, George R. Wright, & Elijah Fry, of the town of Concord, in the said county of Iroquois, are held and firmly bound unto the Portsmouth Savings Bank, of Portsmouth, in the State of New Hampshire, in the

sum of forty-three hundred dollars, to be paid to the said Portsmouth Savings Bank, or its successors; to which payment, well and truly to be made, said town does hereby bind itself, and we do hereby bind ourselves, and each of us, and our and each of our heirs, executors, and administrators, firmly by these presents; sealed with the seal of said town of Concord, and our respective seals, and dated this 28th day of June, A. D. 1873.

Whereas the above-named town of Concord hath prosecuted a
40 writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named town of Concord shall prosecute its said writ of error to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

ALVAN L. PEARCE, [SEAL.]
Supervisor.
WALTER B. SIMONDS, [SEAL.]
Town Clerk.
MORRIS KANE. [SEAL.]
JOHN W. YOUNG. [SEAL.]
JAMES H. KARR. [SEAL.]
ANDERSON TYLER. [SEAL.]
ROBERT KARR. [SEAL.]
ABRAM HOGLE. [SEAL.]
GEORGE R. WRIGHT. [SEAL.]
ELIJAH FRY. [SEAL.]

Approved.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed July 15th, 1873. William H. Bradley, clerk.

41 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein the Portsmouth Savings Bank is plaintiff and the town of Concord defendant, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office in the city of Chicago, in said district, this 9th day of October, A. D. 1873, and of our Independence the 98th year.

[SEAL.] WM H. BRADLEY, *Clerk.*

42 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between the Portsmouth Savings Bank, plaintiff, and the town of Concord, defend-

ant, a manifest error hath happened to the great damage of the said the town of Concord, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Wash-
43 ington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Nathan Clifford, acting Chief-Justice of the Supreme Court of the United States, this tenth day of June, A. D. 1873, and of our Independence the 97th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsed:) Circuit court U. S., northern dist. Illinois. The Portsmouth Savings Bank vs. The town of Concord. Writ of error.

44 To the Portsmouth Savings-Bank, greeting:

You are herby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The Town of Concord is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry W. Blodgett, judge of the said circuit court, this 6th day of October, A. D. 1873.

H. W. BLODGETT, *Judge.*

Service of above accepted, Oct. 6, 1873.

ISAAC G. WILSON,
Att'y for Portsmouth Savings-Bank.

(Indorsed:) Portsmouth S. Bank vs. Town of Concord. Citation.

45 Supreme Court of the United States, October term, 1873.

THE TOWN OF CONCORD, PLAINTIFF IN ERROR,
vs.
THE PORTMOUTH SAVINGS-BANK, DEFENDANT in error.

Writ of error to the circuit court of the United States for the northern district of Illinois.

And now comes the said plaintiff in error, by Monroe & Bisbee, its attorneys, and says, that in the record and proceedings aforesaid there is manifest error, in this, to wit:

I. Said circuit court erred in admitting said bonds and interest-coupons in evidence, upon the trial of said cause, against the objections of plaintiff in error.

II. Said circuit court erred in refusing to dismiss said cause for want of jurisdiction, and in overruling the motion of plaintiff in error to that effect.

46 III. Said circuit court erred in refusing to strike out all the evidence offered by said defendant in error upon the trial of said cause, and in overruling the motion of plaintiff in error to that effect.

IV. Said circuit court erred in overruling the motion of said plaintiff in error for a new trial in said cause, and rendering judgment for said defendant in error therein.

Wherefore said plaintiff in error prays that said judgment of said circuit court may be reversed, and such further proceedings had therein as may be agreeable to law and justice.

MONROE & BISBEE,
Attorneys for Plaintiff in Error.

And the said defendant in error, *cos* Isaac G. Wilson, its attorney, comes and says that in the record and proceedings aforesaid there is not any error, and prays that said judgment be affirmed.

ISAAC G. WILON,
Att'y for Defendant in Error.

(Indorsement on cover:) No. 254. The Town of Concord, plaintiff in error, vs. The Portsmouth Savings-Bank. N. Illinois C. C. U. S. Filed 15th October, 1873.

Supreme Court of the United States.

No. 254.

TOWN OF CONCORD,
Plaintiff in Error,

v.

THE PORTSMOUTH SAVINGS BANK,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OF FACTS.

This is a suit brought to recover the amount of twenty-five interest notes or coupons of $100 each, which were respectively attached to twenty-five bonds of $1,000 each, claimed to have been given by the town of Concord to the Chicago, Danville & Vincennes R. R. Co., for the purpose of aiding in the construction of the road of that company.

The Chicago, Danville & Vincennes R. R. Co., was organized under a charter granted by the Legislature of the State of Illinois, in 1865.

Private Laws, 2 *Vol.*, *p.* 140.

This charter does not pretend or purport to confer upon Towns, Cities, or Counties, any right to aid in the construction of said Road, to loan their credit to it, or to levy any tax or to issue any bonds in its aid.

The only power given by statute to this town to raise money in any way to aid this road, is found in the laws of March 7, 1867, and March 24, 1869. The law of 1867 gave cities and towns which lay wholly or partly within twenty miles of the East line of this State, and between Chicago and the Southern boundary of Lawrence County, power "to *donate such a sum of money* as they may "deem proper, to the Chicago, Danville & Vincennes R. "R. Co., to aid in the construction of the road of said "Company, to be *paid to said Company as soon as the track* "*of said Road* shall have been located and constructed "through said city, town or township respectively; "*Provided*, however, that the proposition to appropriate "moneys to said Company shall be first submitted to a "vote of the legal voters of said respective townships, "towns or cities, at a regular, annual, or special meeting, by giving at least ten days notice thereof, and a "vote shall be taken thereon, by a ballot, at the usual "place of election; and if a majority of the votes cast "shall be in favor of the appropriation, then the same "shall be made, otherwise not."

"§ 2. The authorities of said townships, towns or "cities respectively, are hereby authorized and required "to levy and collect a tax, and make such provisions as "may be necessary and proper for the prompt payment "of the appropriation, under the provisions of this law."

On March 24th, 1869, the Legislature of the State of Illinois passed another law, by which, it is claimed, the right to issue these bonds was given. The 2d, 3d, 4th and 5th Sections are all that bear upon this subject, and are as follows:

"§ 2. The legal voters of any town, township, or city "along the line of said railroad, whether said railroad "shall run into or through said town, township, or city, "or not, may, by a majority of the legal voters voting "at any election held for the purpose, make appropria- "tions or donations to aid in the construction of said "railroad; and the proper authorities shall levy and col- "lect taxes, in the manner that other taxes are levied "and collected, to properly meet any obligations assumed "under and by virtue of this act."

"§ 3. Whenever any township shall desire to contri- "bute toward the construction of said railroad, as pro- "vided in section two of this act, the vote may be taken "at any regular or special meeting, and if at any special "town meeting, may be called as now provided by law "for such meetings, and whenever the voters of any town "or city shall desire to contribute toward the construction "of said railroad, a special election may be held by the "proper authorities of any such town or city, upon giv- "ing ten days notice in any newspaper published in such "town or city, or by posting up written or printed no- "tices in four public places in said town or city, of the "time, place and object of such election; or such appro- "priation may be voted at any regular election in such "town or city. The votes at any election held in any

"incorporated town or city, for the object herein men-
"tioned, shall be canvassed and returned as at any other
"election in said town or city; and in all cases the no-
"tices given, shall specify particularly the amount to be
"voted for or against at such election, and in no case
"shall the appropriation exceed the amount specified in
"the notice or notices."

"§ 4. The authorities of any township, town or city—
"such township, town or city having voted to contribute
"aid in the construction of said railroad—may borrow
"money to promptly meet such contribution, and issue
"bonds of such township, town or city, at a rate of inter-
"est not exceeding ten per centum per annum, payable
"annually, or semi-annually, as they may deem best, and
"may negotiate the same on such terms as they may
"deem advisable, and may make the same payable at
"such place or places, and payable at such time or times
"as they may deem for their best interests, and shall
"have power to levy and collect such taxes as may be
"necessary to pay accruing interest or pay the principal
"sum."

"§ 5. In all cases when any township, town or city,
"shall have voted to contribute any aid as hereinbefore
"provided, toward the construction of said railroad,
"the amount or amounts so voted shall become due and
"payable, as soon as said railroad shall be completed
"into or opposite to any such township, town or city."

On the 10th day of November, 1869, notice of a meeting of the voters of the town of Concord was published, in which the legal voters of the town of Concord were notified "that a special town meeting will be held at

"the school-house in the village of Concord, on the "20th day of November, A. D. 1869, at 9 o'clock A. M., "for the purposes following, to wit: To vote for or "against levying a tax on the taxable property of said "town, amounting in the aggregate in two years—to be "levied and collected as other taxes—to the sum of "twenty-five thousand dollars, to be donated to the Rail-"road company building the railroad known as the Vin-"cennes, Danville & Chicago Railroad, *Provided*, said "Railroad Company run the said Railroad through the "village of Concord, or on its boundaries, and to and "through the town of Sheldon, in Sheldon township."

In pursuance of said notice, an election was held on Nov. 20, 1869, and the legal voters of the town of Concord voted to levy a tax upon the taxable property of the town of Concord, amounting in the aggregate, in two years, to be levied and collected as other taxes, to the sum of $25,000, to be donated to the Chicago, Danville & Vincennes Rail Road Company, *provided said road run through the village of Concord*, or on its boundaries, and to and through the town of *Sheldon*.

In the summer of 1870, the C. D. & V. R. R. was located so as *not* to run within three miles of either Concord or Sheldon. But this R. R. Co., on the 17th day of April, 1871, entered into a contract with the Cincinnati, Lafayette & Chicago R. R. Co., by which the latter company agreed to construct its road from a point near Templeton, in Benton county, Indiana, to a point on the C. D. & V. R. R., at or near St. Annes. (Transcript, pp. 34 and 35). The diagram on p. 13 of the Transcript, shows

the route of the C. LaF. & C. R. R., from the point where it meets that of the C. D. & V. R. R. The dotted line shows the route of the road of the latter company, south of St. Annes.

So, as a matter of fact, the Chicago, Danville & Vincennes R. R., never did run "through the village of Concord, or on its boundaries, and to and through the town of Sheldon;" and hence the condition upon which aid was voted by the town of Concord, was never fulfilled by this Company.

The Rail Road Company never having complied with any of these conditions, in October, 1871, procured the Supervisor and Town Clerk to execute, and the Supervisor to bring to Chicago, twenty-five bonds, dated October 1st, 1871. After he reached Chicago, the date of these bonds was changed from October the 1st, 1871, to June 1st, 1871, without the knowledge or consent of the Town Clerk, and $725 was paid by the Rail Road Agent to the Supervisor. The Rail Road Agent says it was for accrued interest. (Transcript, p. 12.)

On the 30th day of May, 1870, notice of an election, or meeting, was given to the voters of the town of Concord, in the following words:

"NOTICE OF ELECTION."

"An election will be held at the school house, in the "village of Concord, on Thursday, the 30th day of June, "1870, to vote for or against subscribing twenty thous- "and dollars to the Kankakee and Indiana Rail Road "Company, and rescinding the vote donating twenty-

"five thousand dollars to the Chicago, Danville and "Vincennes Rail Road Company, cast at an election "held on the 20th day of November, 1869, on conditions "that the said Kankakee and Indiana Rail Road Compa- "ny run said Rail Road from Lafayette, Indiana, to Kan- "kakee City, Illinois, through the town of Concord, in "the township of Concord, Iroquois County, and State "of Illinois, within eighty rods of the bridge across the "Iroquois River, at the said town of Concord, and to "build a side track and a good and sufficient depot in "said town, within one year from the date of this election, "to wit: the 30th day of June, 1870, and to have the "cars running the whole route in the same time."

"And said twenty thousand dollars are to be paid in "township bonds bearing ten per cent. interest per an- "num, in favor of said Company, in full of said sub- "scription, in ten years from the date of the completion "of said Rail Road, and the running of the cars "thereon."

On the 30th day of June, 1870, this proposition was voted upon, and carried by 92 to 28 votes.

The twenty-five bonds off which these twenty-five coupons were cut, were issued on the 19th day of October, and dated October 1st, 1871, but after they were signed, and without the knowledge or consent of the Town Clerk, their date was changed to the 1st day of June, 1871, delivered to the Rail Road Company, and by the Rail Road Company sold to the plaintiff, for a valuable consideration. The case was tried by the court below without a jury, and resulted in a judgment for the Bank. To reverse this judgment this writ is prosecuted.

The following are the errors assigned:

I. Said circuit court erred in admitting said bonds and interest coupons in evidence upon the trial of said cause, against the objections of plaintiff in error.

II. Said circuit court erred in refusing to dismiss said cause for want of jurisdiction, and in overruling the motion of plaintiff in error to that effect.

III. Said circuit court erred in refusing to strike out all the evidence offered by said defendant in error upon the trial of said cause, and in overruling the motion of plaintiff in error to that effect.

IV. Said circuit court erred in overruling the motion of said plaintiff in error for a new trial in said cause, and rendering judgment for said defendant in error therein.

ARGUMENT.

I.

The Supervisor and Town Clerk of this town had no authority whatever to issue these bonds, and they are absolutely void.

The law of March 7, 1867, authorized this town "to "appropriate such a sum of money" as it might deem proper to aid this road, "to be paid to said Company as "soon as the track of said road shall have been located "and constructed through said town."

It is evident that the legislature did not contemplate the issuing of any bonds. On the contrary it contemplated the raising of this money by taxation, and its payment as soon as the track of the road should have been constructed through the town. (Read §§ 1 and 2 supra, and it will appear that there is no doubt upon this point.)

It may be fairly supposed that the legislature was unwilling to grant to these towns, power to issue bonds, and incur a large debt, while it was willing they should aid the Rail Road as much as they were willing to pay at once. The reason and wisdom of this is apparent.

The law of March 24th, 1859, did not authorize the issuing of these bonds to this R. R. Co.

§§ 2 and 3 of this law, authorize towns by a majority of the legal voters, voting at an election held for that purpose,

"to make appropriations or donations to aid in the con-
"struction of said Rail Road," and *authorize the levy and collection of taxes to promptly pay the same.*

§ 3 provides for the notices and methods of holding the election.

§ 4 provides that a town having *voted to contribute aid in the construction* of this Road, may borrow money to promptly meet such contribution, and issue the bonds of such town. It may be thought that the authority to issue bonds to borrow the money voted, is equivalent to an authority to issue the bonds directly to the Rail Road Co., but

§ 5 provides that the amount so voted, shall become due and payable only when the road shall be completed into or opposite such town.

The notice calling the special town meeting, held Nov. 20, 1869, to vote upon the subject of donating $25,000 to this Road, contains the following language: "To vote for "or against levying a tax upon the taxable property of "said town, amounting in the aggregate in two years, to "be levied and collected as other taxes, to the sum of "$25,000, to be donated to the R. R. Co., building the "R. R. known as the Vincennes, Danville and Chicago "Rail Road, provided said Rail Road Company run said "Rail Road through the village of Concord," etc.

It is very plain that this meeting voted upon the immediate raising by taxation, $25,000, to be donated to the Rail Road, provided it run its track through the Town,

and not at all upon the issuing of its bonds, or loaning its credit to the Rail Road, even if the Rail Road Company complied with the provision upon which the aid was voted.

It followed strictly the power given by the law of March 7, 1867, and it seems to us that the town acted under this law in holding this election, and not under the law of March 24, 1869.

But if the law of March 24, 1869, is the one governing this case, still the officers of this town had no authority to issue these bonds under this vote.

The vote was to levy a tax upon the taxable property of the town, amounting in the aggregate, in two years, to the sum of twenty-five thousand dollars, to be donated to this Rail Road Company, provided the Road ran through the village of Concord, etc. This vote did not constitute a legal obligation, or valid claim against the town, until the Rail Road was located according to the vote; and as a matter of fact, the road was never located within three miles of the town.

The vote being upon that condition, and the condition never having been fulfilled, no debt or obligation was created. In fact, no aid had been voted to this road at all.

So far as this town was concerned, the 4th section of the law of March 24, 1869, has no application whatever.

That only applies to towns "having voted to contribute aid" in the construction of this Road.

This was a vote to contribute aid, provided the road was located through the town, and to pay then, and not before.

The Road having been located outside the prescribed boundaries, the case stands precisely as though no vote whatever had been had. It stands precisely as though the legislature had not authorized the Supervisor and Town Clerk to issue any bonds for the benefit of this Road.

So we say that no power was given by the law, or by this vote, or by both together, to issue these bonds, and they are void, into whosesoever hands they come.

The legal question here presented is important; and when one attempts to read and examine all the authorities bearing upon it, he finds that they are, to a certain extent, conflicting, and that many of them have drifted so far from the fundamental principles upon which they ought to rest, that little, if any, satisfaction or information can be derived from them.

A corporation, is, in the eye of the law, but an individual, a person. The same fundamental principles of the law apply to it, that control the business transactions of private individuals. If I give to A. the legal right and authority to sign my name to a negotiable instrument, and while having that right and authority, he signs my name to a note, and places it upon the market, and it before maturity comes into the hands of a *bona fide* holder for value, it is good against me, no matter how good my defense to it might have been in the hands of the original holder. But if A. signs my name to a note, without any right or authority, the note is void everywhere, in the hands of a *bona fide* purchaser, as well as any one else, because the purchaser is bound in law to know the extent of A's authority.

If a municipal corporation gives to its officers, the legal authority to make and issue its bonds, and while that authority exists, the officers make and issue its bonds, and they come into the hands of a *bona fide* purchaser, they are binding upon the corporation. But if the officers of a municipal corporation, without any right or legal authority, make and issue its bonds, they are void into whosesoever hands they come, and a *bona fide* holder stands no better than any one else, for the reason that he is bound in law to know the extent of the authority of those executing the bonds.

Dillon on Municipal Corp., p. 149, § 108.
Pendleton Co. v. *Amy*, 13 Wallace, 304.
Marshall v. *Cook*, 38 Ill., 44.

It will be borne in mind that this is not a case where the Supervisor and Town Clerk possessed any general authority to issue bonds, such as is frequently given by charter or fundamental law, to certain officers of municipal corporations. They had no such general authority or capacity to contract as would justify a purchaser in taking the bonds without inquiring into their validity. It is, as the Court said, 10th Wallace, page 683, "a case "where the power to contract never existed, where the "instruments might with equal authority have been "issued by any other citizen of the County. It is a case, "too, where the holder was bound to look to the action "of the officers of the County," (Town,) "and ascertain "whether the law had been so far followed by them as "to justify the issue of the bonds. The authority to "contract must exist, before any protection as an inno-"cent purchaser can be claimed by the holder."

It will, undoubtedly, be urged in this case, that this decision has been overruled by subsequent decisions of this Court. We can find no case in which the soundness of the principle laid down in that case, is even questioned; we can find no case where it is mentioned with disapproval. We do not believe this Court has, or ever will, pronounce this decision wrong. We think the late decisions which are thought to be in conflict with this, were made in cases where the officers making the bonds had general authority to issue them; or in cases where it was taken for granted that such authority existed.

In *Pendleton County* v. *Amy*, 13 Wallace, 297, the *bona fide* holder of certain bonds of Pendleton County, brought suit upon them, and recovered judgment in the court below. The County, then, by an exceedingly inartificial plea, attempted to deny legislative authority to issue the bonds. The case in the Supreme Court was made to turn upon the validity of this plea, which is found upon page 299 (3d plea). The Court, in deciding the case, uses the following language:

"The third plea was in effect a denial of any legisla-
"tive authority to the County, to subscribe to the stock
"of the railroad company, and to issue bonds for the
"payment of such subscription. The general demurrer
"to it, raises the question whether it presented a sub-
"stantial defense to the action."

"It is to be noticed at the outset, that the plea *concedes*
"*legislative authority* to the county, to make a subscrip-
"tion and to *issue bonds* in *payment*, though the exercise
"of the authority was required to be preceded by a popu-

"lar vote. It concedes that the bonds were in fact made "and issued. We say it concedes this, because such "making and issue are alleged in the declaration, and "the plea does not traverse the allegation. It concedes "that the subscription was made; that the bonds were "delivered to the Company in payment; that they were "sold for $50,000; that the plaintiff subsequently became "the owner, and hence that he stands in the position of "a purchaser for value; and it concedes that the County "obtained for the bonds a certificate of stock in the rail- "road Company, which it now holds."

"Without legislative authority, a municipal corpora- "tion, like a County, may not subscribe to the capital "stock of a railroad company, and bind itself to pay its sub- "scription, or issue its bonds in payment; and if it does, "the purchase of such bonds is affected by the want of "authority to make them. But it does not follow from "this, that when the legislature has given its sanction to the "issue of bonds, provided that before their issue certain "things shall be done by the officers, or the people of the "county, the bonds can *always* be avoided, in the hands "of an innocent purchaser, by proof that the County of- "ficers, or the people, have not done, or have insuffi- "ciently done, the things which the legislature required "to be done, before the authority to subscribe or to issue "bonds should be exercised. A purchaser is not always "bound to look farther than to discover that the power "has been conferred, even though it be coupled with "conditions precedent. If the right to subscribe be made "dependent upon the result of a popular vote, the of- "ficers of the county must first determine whether the

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"vote has been taken as directed by law, and what the "vote was. When, therefore, they make a subscription, "and issue county bonds in payment, it may be fairly "presumed in favor of an innocent purchaser of the "bonds, that the condition which the law attached to the "exercise of the power, has been fulfilled. To issue the "bonds without the fulfillment of the precedent condi- "tions, would be a misdemeanor, and it is to be pre- "sumed that public officers act rightly. We do not say "this is a conclusive presumption in all cases, but it has "more than once been decided that a county may be "estopped against asserting that the conditions attached "to a grant of power were not fulfilled. The estoppel "in these cases, was either by recitals in the bonds, that "the conditions precedent had been complied with, "or by the fact that the county had subsequently levied "taxes to pay interest on the bonds. In the present "case, it does not appear in the pleadings, whether or "not the bonds contained any such recitals, nor whether "the officers of the county have levied taxes to pay in- "terest on them, or whether any interest has been paid. "These grounds of estoppel do not exist. But if such "acts and such recitals are sufficient to protect *bona fide* "purchasers against an attempt to set up non-compliance "with the conditions attached to the grant of power to "issue the bonds, it is not easy to see why the pleadings "do not show an estoppel in this case. The County re- "ceived in exchange for the bonds a certificate for the "stock of the railroad company, which it held about "seventeen years before the present suit was brought, and "which it still holds. Having exchanged the bonds for

"the stock, can it retain the proceeds of the exchange,
"and assert against a purchaser of the bonds for value,
"that though the legislature empowered it to make them,
"and put them upon the market, upon certain condi-
"tions, they were issued in disregard of the conditions?
"We think they can not, and therefore that the third plea
"can not be sustained."

It seems entirely clear that if the plea in this case had set up the facts that exist in the case at bar, the court would have sustained the plea. By reversing the case, the court did, in effect, sustain the plea, but intimated that upon the facts, the County may be estopped from setting up this defense for the reason, that the bonds were exchang·d for stock seventeen years before, and that the county does not offer to return the stock.

The 4th section of the act of March 24th, 1869, which it is claimed gave the authority to issue these bonds, is in the following words: "The authorities of any town-
"ship, town or city—*such township, town or city having voted*
"*to contribute aid in the construction* of said railroad — may
"borrow money to promptly meet such contribution, and
"issue bonds of such township, town or city, at a rate of
"interest not exceeding ten per centum per annum, pay-
"able annually or semi-annually, as they may deem
"best, and may negotiate the same on such terms as they
"may deem advisable, and may make the same payable
"at such place or places, and payable at such time or
"times, as they may deem for their best interests, and
"shall have power to levy and collect such taxes as may
"be necessary to pay accruing interest, or pay the prin-
"cipal sum."

It is certain, that this township never voted absolutely to contribute aid to this road. The vote was upon a certain condition which was never fulfilled.

The only authority here is this vote. By it the legal voters of the town of Concord agreed to aid this railroad to the extent of $25,000, to be levied and collected by tax in two years, provided the road should run through the town of Concord, etc.

Can it be said that they agreed to aid it absolutely? If not, how does the section above quoted, help the Bank? Has this town ever voted aid to this road within the meaning of this section? If not, no legislative authority to this Supervisor and Town Clerk is shown. This Court will bear in mind that supervisors and town clerks have, under the laws of Illinois, *no* general authority to issue bonds.

Would it be contended that this Town Clerk and Supervisor, without legislative authority, and a vote, could issue bonds so as to bind this town? If not, how does this vote and this law, one or both, give the authority required under all the decisions?

Suppose these bonds had never been issued, and the railroad company had brought suit against this town upon the agreement implied from the vote, would it be contended that under the proof here given the company could recover?

If not, then the only question here is, whether the plaintiff was bound in law to know what this vote was, and whether, under the circumstances, any authority existed to issue the bonds.

It is submitted that none of the authorities go far enough to sustain the negative of the question here put.

In the case of *Com'rs of Knox County* v. *Aspinwall et al.*, 21 Howard, 539, the legislative power given by the legislature, was clear and certain, and the proof showed "that at a meeting of the board of commissioners of the "county of Knox, on the 26th February, 1849, it or- "dered under the power given in the second section above "referred to that the county subscribe $200,000 of the "capital stock of the Ohio & Mississippi Railroad Com- "pany, and also that at a meeting of the 25th of Octo- "ber, 1858, after reciting that, in accordance with the "wishes of the voters of the county as expressed at the "election held for that purpose in the several townships "on the first Monday of March, 1849, it is ordered that "the Auditor, in the name and for the county of Knox, "subscribe to the capital stock of the Ohio & Mississippi "Railroad Company, four thousand shares of fifty dol- "lars each, or the sum of $200,000; and that the auditor "be authorized to vote at all elections and meetings of "stockholders, or to appoint a proxy in his stead. And "that in pursuance of this direction, the auditor sub- "scribed the four thousand shares, and received certifi- "cates in the name of the board of Commissioners of the "County for the same; and also executed and delivered "the bonds of the County, as provided for in the third "section of the act of 1849, attaching thereto coupons "for the interest. The bonds and coupons in question "were issued under this authority."

The case stands on a basis entirely different from the

case at bar, and, as it seems to us, is no authority against us.

The case of *Moran* v. *Com'rs of Miami County*, 2 Black, 722, was a case where the County issued its bonds to the Railroad, in exchange for stock. The charter of the Railroad Company authorized the County Commissioners of each County through which the road should pass, to take as much stock of the company as they thought proper. The act of the legislature authorized the Commissioners to borrow money, etc. The Court say, in deciding the case, on page 730, "both parties seem to us "to have acted within their respective powers—the rail-"road within its charter to allow the counties to sub-"scribe for stock in it, and the County of Miami to do "so, according to the power given it to borrow money." This is the decision, and certainly the facts in the case at bar are entirely different. Here the Supervisor and Town Clerk had no more legal right to issue these bonds, than any other citizen of the town.

The laws of Illinois do not authorize Supervisors and Town Clerks to sign or issue the bonds of their towns. It does not give them the right of determining when bonds shall be issued.

These men were acting under a *special* authority, and the purchasers of the bonds were bound to know the extent of that authority.

The court is asked to examine the case of *City of Lexington* v. *Butler*, 14 Wallace, 282. It will be seen that the decision in that case rested upon the principle that where

a corporation, *under any circumstances*, has power to issue negotiable securities, the *bona fide* holder has a right to presume they were issued in accordance with the power. The court say, page 296, "admitted as it is, that the "corporation defendants possessed the power to subscribe "for the stock and to issue these bonds, it is clear that "the plaintiff (a *bona fide* holder) is entitled to recover "upon the merits." We see no reason to believe that this Court intended to repudiate the doctrine laid down in 10th Wallace. Neither do we find any decision which holds that the purchaser is not bound to know the authority under which the bonds were issued.

It is no answer to this argument, to say that the entries on the records of this town, of October 9, 1871, showed that twenty-five $1000 bonds, with interest coupons attached, had been issued in favor of this Railroad, in consideration of its having been run through the villages of Concord and Sheldon, and in accordance with the vote of Concord township, cast on the 20th day of November, 1869, because the same record and book contained the record of a vote taken on the 30th day of June, 1870, rescinding the vote of the 20th of November, 1869. (Transcript, p. 12, Record, p. 29)

This recital, relied upon by opposing counsel, certainly can not be held to overcome record facts, which show such recital to be false.

The record of the date of the delivery of these bonds showed: (1), that the bonds could not be legally issued until this road was built through the towns of Concord

and Sheldon, and this required the purchaser of the bonds to ascertain whether the road had ever been built through those towns; (2), the record showed that the vote of November 19, 1869, under which these bonds were issued, had been rescinded prior to the delivery of the bonds, and had been by the town voted to the Kankakee & Indiana R. R. Co., whose road ran through this town.

If the Supervisor and Town Clerk had no power to issue these bonds, they certainly could not bind the town by a false entry or recital inserted in the town records. Neither can such a recital operate as an estoppel upon the town, particularly when the same record showed that the original power, if any, to issue the bonds, had been rescinded.

This court, in the case of *Nugent* v. *The Board of Supervisors of Putman County*, decided at the October term, 1873, say: "He found the bonds and the coupons "upon the market, payable to the Kankakee & Illinois "River Rail Road Company or bearer. Proposing to "buy, he had only to inquire whether the county was, "by law, authorized to issue them, and whether their "issue had been approved by a popular vote. He was "not bound to inquire farther, and had he inquired, he "would have found full authority for the issue."

If the plaintiff below, the purchaser of the bonds in the case at bar, was bound to see that the town "was authorized to issue them," or "whether their issue had been approved by a popular vote," or whether, at this date, there was any existing authority for their issue,

then certainly the bank took them subject to the defense here interposed, for the town records showed conclusively that these officers had no power or authority then to issue them.

II.

The date of payment of these bonds was illegally changed.

The bonds from which these coupons were cut bear date the day of 1870. (Transcript, p. 11.)

The time of the payment of the coupons was changed from June 1, 1871, to June 1, 1872. (Transcript, p. 12.) The bonds were delivered to the Rail Road Co., Oct. 17, 1871.

On the 9th day of October, 1871, the Supervisor, in the recital on the town records before referred to, states that he delivered the bonds on the 9th day of October, 1871.

The date of the bonds was changed by the Supervisor without the knowledge or consent of the Town Clerk. (Transcript, p. 12.)

Take into consideration the record of the town, showing that this vote of aid was on condition that this road should run through the town; that this condition was never complied with; that this vote of aid had been rescinded; the changes in the dates of these bonds and coupons; the fact that the record showed that they were delivered to the Rail Road Co., Oct. 9, 1871, and the law which requires the person who derives title through the exercise of the power to see to it that the power existed at the time of its exercise, and this bank can not be held to be a *bona fide* purchaser of these bonds.

This is a very different case from one where the officers executing the bonds have general authority to execute bonds, and as we contend a very different rule applies.

To say the least, there was in this record sufficient facts disclosed to put all persons dealing in these bonds on inquiry. Such inquiry would have shown the bonds to be void.

It cannot be fairly contended that this vote of rescission was not clear, definite and certain.

The record of this town showed (Transcript, p. 12) that a meeting of all legal voters and taxpayers of the town of Concord was duly called and held the 30th day of June, 1870, "to vote for or against subscribing $20,000 to the "Kankakee & Indiana Rail Road Co., *and rescinding the* "*vote donating* $25,000 to the C. D. & V. Rail Road Co., "on Nov. 20, 1869."

The ballot used at this meeting was as follows: "For "the tax of $20,000 as subscription to the capital stock "of the Kankakee and Indiana Rail Road, *in lieu of the* "$25,000 *voted on the* 20th *day of November*, 1869, *to the* "*Chicago, Danville and Vincennes Rail Road.*"

Take the call for the meeting and the vote together, and there can be no possible doubt but that the vote of Nov. 20, 1869, was, by the people of this town, legally and properly rescinded.

III.

The vote of rescission took place June 30th, 1870. *This vote ended the power of the Supervisor and Town Clerk to is-*

sue any bonds, if any such power had ever been possessed by them.

That the town had the power to rescind the vote above referred to. is well settled.

Dillon on Municipal Corp., Sec. 228.
Aspenwall v. *Com'rs of Jo. D. Co.*, 22 How., 364.
Stoddard v. *Gilman*, 22 Vt., 568.
Bond v. *Negus*, 3 Mass., 230.
Stine v. *Supervisors*, 47 Ill., 256.
Beckwith v. *English*, 51 Ill., 147.

Here, the vote of rescission was made, and was of record in the same book in which the original vote was recorded, long before the issue of the bonds. The purchaser of the bonds was bound to know whether or not there was any authority to issue them. If the vote of rescission was *regular*, was *authorized*, and the evidence of it was placed upon the records in the same manner that the original vote of aid was, it seems to us plain that under the authorities this plaintiff was bound to know it and took the bonds subject to this defense.

In conclusion, this case is important, both on account of the amount in controversy, and the legal questions involved.

The people of this country should know whether or not the officers of counties and towns who have no general authority to execute and deliver bonds, or negotiable securities, can, without authority of law, and without the knowledge or consent of the legal voters of such towns or counties, bind them to an unlimited extent.

If the general principles of the law applicable to principal and agent are to be disregarded, and purchasers of bonds issued by agents of counties and towns, whose only authority to act is derived from special laws, are to be under no legal obligation to inquire into the extent of the authority delegated to such agents, and by them possessed at the time of the execution and delivery of such bonds, surely every citizen ought to know it.

The knowledge that such is to be the rule would startle and alarm the whole country.

It would prove a temptation to corruption and crime on the part of our agents and officers, and would encourage carelessness and fraud in dealers in this class of securities.

It does seem to us that courts have already gone far enough upon this line, and that it is high time they should pause and consider the consequences of their rulings.

HENRY S. MONROE AND
LEWIS H. BISBEE,
Att'ys for Pl'ff. in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1875.

TOWN OF CONCORD, Plaintiff in Error,
vs.
THE PORTSMOUTH SAVINGS BANK,
Defendant in Error.

The court below erred in overruling the objections of plaintiff in error to the introduction of the bonds and interest warrants as evidence, for the following among other reasons:

1st. The bonds and interest warrants were void on account of material alterations made in them after they were issued.—(Record, 12.)

2d vol. Parsons on Bills and Notes, 550.
Bendict et al. vs. Cowden, 49 N. Y., 396.

2d. The supervisor and town clerk constituted the "authorities" of the town of Concord, and the supervisor had no power to consent to the alterations of the bonds and interest warrants without the consent or knowledge of the town clerk.

Marshall vs. Silliman, 61 Illinois, 218.
The People vs. Supervisor and Town Clerk of Santa Anna, 67 Illinois, 57.
The People vs. Supervisor and Town Clerk of Laenna, 67 Illinois, 65.

3d. The supervisor and town clerk had no lawful authority from the people of the town to issue the bonds.

Marsh vs. Fulton Co., 10 Wallace, 676.
Bissel vs. Kankakee, 64 Illinois, 249.
Harding vs. Rockford, 65 Illinois, 90.
McWhorter vs. The People, 65 Illinois, 290.
Big Grove vs. Wells, 65 Illinois, 263.

4th. The Legislative Assembly could not confer upon the "authorities" of the town power to issue the bonds without the consent of the people of the town.

Marshall vs. Silliman, 61 Illinois, 218.

5th. The bonds in question were prohibited by the Constitution of the State of Illinois, and are therefore void.

Richards vs. Donagho, 66 Illinois, 78.
Schall et al. vs. Boroman et al., 62 Illinois, 321.

GEO. H. WILLIAMS,
For Plaintiff in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES.

No. 254.

TOWN OF CONCORD,
Plaintiff in Error.

—VS.—

THE PORTSMOUTH SAVINGS BANK,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argument for Defendant in Error.

ISAAC G. WILSON and SANFORD B. PERRY,
Att'ys for Def't in Error.

CHICAGO:
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1875.

Supreme Court of the United States.

No. 254.

TOWN OF CONCORD,
Plaintiff in Error.
—vs.—
THE PORTSMOUTH SAVINGS BANK,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Statement of Facts.

This is an action upon twenty interest warrants, or coupons, for $100 each, due June 1st, 1872, which were attached to twenty bonds for $1,000 each, bearing date June 1st, 1871, and numbered respectively 1 to 14, and 19 to 25, issued by the town of Concord, County of Iroquois, in the State of Illinois, in aid of the construction of the Chicago, Danville and Vincennes Railroad. The bonds were delivered to the railroad company October 17th, 1871, and put upon the market and sold, the twenty above specified with the coupons now in suit annexed, being purchased by the Portsmouth Savings Bank, without notice of any defect or infirmity in the bonds.

They recite upon their face that they are issued under and by virtue of a law of the State of Illinois to authorize cities, towns or townships, lying within certain limits, to appropriate moneys, and levy a tax, to aid the construction of the Chicago, Danville and Vincennes Railroad, and that the faith of said town is pledged for the interest and principal.

Record, p. 5.

Upon the back of each bond is a certificate of the auditor of the State of Illinois under his seal of office, bearing date October 20th, 1871, certifying that the bonds had been registered in his office on that day, pursuant to the provisions of an Act entitled "An Act to fund and provide "for paying the railroad debts of counties, townships, "cities and towns" in force April 16, 1869.

It was admitted upon the trial that the town of Concord lies within 20 miles of the East line of the State of Illinois, and between the City of Chicago and the Southern boundary of Lawrence County.

Record, p. 9. Abs. p. 21.

It was also admitted that, at the date of the bonds, George D. Dunning was supervisor, and E. D. Boone was town Clerk of said town of Concord, and that, as such supervisor and town Clerk they signed the bonds and the interest warrants in suit, and delivered the same to the Chicago, Danville and Vincennes Railroad Company.

Record, p. 9. Abs. 21.

It was also admitted that the County of Iroquois (of which the defendant was a town) had adopted and was organized under the township organization law of the State of Illinois at the time said bonds were issued. (Rec., 10.)

The Chicago, Danville and Vincennes Railroad Company was organized under a charter granted by the Legislature of the State of Illinois in 1865.

Private Laws, 1865. Vol. 2, page 140.

Under its charter the Company commenced the building of its road at Chicago, running thence southerly, and within the limits prescribed by its charter, through the towns of St. Anne, Concord and Sheldon, as shown on the diagram

in the printed record, on page 13. The Company procured the right of way, graded the track, tied and bridged the road through the towns of Concord and Sheldon, when they leased the road for 999 years to the Cincinnati, La Fayette and Chicago Railroad Company, and contracted with that Company in the lease to finish the road and run it in connection with the Chicago, Danville and Vincennes Road to Chicago, the latter Company to furnish the motive power and rolling stock necessary to operate the road for a time, and the gross earnings to be divided between the Companies in certain specified proportions. Rec. p. 13.

The road, as thus completed, *was in operation, and cars running thereon, at the time of the issue and delivery of the bonds in November*, 1871, *to the Chicago, Danville and Vincennes Company.* Rec. p. 13. Abs. 31.

Upon making this arrangement with the LaFayette Company, the Chicago, Danville and Vincennes Company commenced back at St. Anne's, and continued a second line due south from St. Anne's, as shown by the dotted lines on said plat, along by the towns of Concord and Sheldon at a distance of two and a half or three miles west of the town line, but at no point touching either of said towns. This action of the Company was matter of public notoriety, and well known to the people and tax payers of the town of Concord long before the bonds were delivered, although sometime after they were made out. The officers of the road conferred with many of the citizens of the town of Concord as to the proposed new arrangement, and the people were pleased with the change, as it would give them a better southern connection, while the terminus north, at Chicago, would be the same. Rec. p. 14.

Laws.

An Act of the Legislature of the State of Illinois, found on page 842 of Vol 1, Private Laws 1867, provides :

" That all incorporated cities and towns acting under " the township organization law, which lie wholly or part-

" ly within 20 miles of the east line of this State, and also " between the City of Chicago and the southern boundary " of Lawrence County, be and the same are hereby sever- " ally authorized to appropriate such sum of money as " they may deem proper to the Chicago, Danville and Vin- " cennes Railroad Company, to aid in the construction of " the road of said Company, to be paid to said Company " as soon as the track of said road shall have been located " and constructed through said city, town or township " respectively ; *Provided*, however, that the proposition to " appropriate moneys to said Company shall be first sub- " mitted to a vote of the legal voters of said respective " townships, towns or cities, at a regular, annual or special " meeting, by giving at least ten days notice thereof ; and " a vote shall be taken thereon by ballot at the usual place " of election ; and if the majority of the votes cast shall be " in favor of the appropriation, then the same shall be " made, otherwise not.

§ 2. " The authorities of said townships, towns or " cities respectively are hereby authorized and required to " levy and collect a tax, and make such provisions as may " be necessary for the prompt payment of the appropria- " tion under the provisions of this law."

An act of the Legislature of the State of Illinois, approved March 24, 1869, and found in Vol. 3, Private Laws of 1869, pages 357, 358, is as follows:

" An Act to enable towns, townships, cities or counties, " along the line of the Chicago, Danville and Vincennes " Railroad to contribute towards the construction of said " railroad."

§ 1. Provides that counties through which the road passes may loan their credit, and borrow money to aid the road, &c.

§ 2. " That the legal voters of any town, township or " city along the line of said road, *whether said railroad* " *shall run into or through said town, township, or city, or* " *not*, may by a majority of the legal voters voting at any " election held for the purpose, make appropriations or " donations to aid in the construction of said railroad; and " the proper authorities shall levy and collect taxes in the " manner that other taxes are levied and collected, to " promptly meet any obligations assumed under and by " virtue of this act."

§ 3. " Whenever any township shall desire to contrib-

" ute towards the construction of said railroad, as provid-
" ed in section 2 of this act, the vote may be taken at any
" regular or special meeting, and if any special town meet-
" ing may be called as now provided by law for such meet-
" ings; and, whenever the voters of any town or city shall
" desire to contribute towards the construction of said
" railroad, a special election may be held by the proper
" authorities of any such town or city, upon giving ten
" days' notice in any newspaper published in such town or
" city, or by posting up written or printed notices in four
" public places in said town or city of the time, place and
" object of such election; or such appropriation may be
" voted at any regular election in such town or city. The
" votes at any election held in any incorporated town or
" city for the object herein mentioned, shall be canvassed
" and returned as at any other election in said town or
" city; and in all cases the notices given shall specify par-
" ticularly the amount to be voted for at such election, and
" in no case shall the appropriation exceed the amount
" specified in the notices."

§ 4. " The authorities of any township, town or city,
" such township, town or city having voted to contribute
" aid in the construction of said railroad, *may borrow mon-*
" *ey to meet such contribution, and issue bonds of such town-*
" *ship, town or city, at a rate of interest not exceeding ten*
" *per cent. per annum, payable annually or semi-annually,*
" *as they may deem best, and may negotiate the same on*
" *such terms as they may deem advisable, and may make the*
" *same payable at such place or places, and payable at such*
" *time or times as they may deem for their best interests;*
" and shall have power to levy and collect such taxes as
" may be necessary, to pay accruing interest, or pay the
" principal sum."

§ 5. " In all cases when any township, town or city
" shall have voted to contribute any aid as hereinbefore
" provided, towards the construction of said railroad, the
" amount or amounts so voted shall become due and pay-
" able, *as soon as said railroad shall be completed into*, or
" opposite to any such township, town, or city."

Section 7 of an Act of the Legislature of the State of Illinois, passed April 16, 1869, and found on page 556, Gross' Statutes, provides as follows :

" And it shall not be lawful to register any bonds, under
" the provisions of this act, or to receive any of the ben-
" efits or advantages to be derived from this act, until after

" the railroad, in aid of the construction of which the debt
" was incurred, *shall have been completed near to or in*
" *such county, township, city or town, and cars shall have*
" *run thereon;* and none of the benefits, advantages or pro-
" visions of this act shall apply to any debt, unless the sub-
" scription or donation creating such debt was first sub-
" mitted to an election of the legal voters of said county,
" township, city or town, under the provisions of the laws
" of this State, and a majority of the legal voters living
" in said county, township, city or town were in favor of
" said subscription, aid or donation."

Subsequent to the passage of the laws severally above quoted, a special town meeting of the legal voters and taxpayers of the town of Concord was duly called and held on the 20th day of November, 1869, at which the town voted in favor of levying a tax on the taxable property of the
Rec. p. 11. town, amounting in the aggrgate in two years to the sum of $25,000, to be donated to the Chicago, Danville and Vincennes Company, provided the company should run its road through the towns of Concord and Sheldon, and to take such measures, in pursuance of law, as should be considered necessary to carry the objects of the meeting into effect.

On the 20th day of June, 1870, the railroad company filed in the town clerk's office a written notice of the acceptance of the donation, the same being addressed to the supervisor and town clerk.

The following is a copy of the town records of the issuance of the bonds :

" STATE OF ILLINOIS, Iroquois County—ss.
" Be it remembered that on the 9th day of October, A.
" D. 1871, the supervisor and town clerk of the town of
" Concord, in said county, in pursuance of law, proceeded
" to execute township bonds, numbered from 1 to 25, con-
" secutively, for $1,000 principal each, payable yearly, at
" ten per cent. on the principal, for ten years from the first
" day of June, 1871, in favor of the Chicago, Danville and
" Vincennes Railroad Company, in consideration of said
" company having run their road through the villages of
" Concord and Sheldon, and in accordance with the vote

" of Concord township, cast on the 20th day of Novem-
" ber, A. D. 1869, donating $25,000 in aid of said com- Rec. p. 11.
" pany, on the conditions above stated.
" Said bonds delivered by me.
" GEORGE R. DUNNING,
" *Supervisor.*
" EDW'D D. BOONE, *Town Clerk.*"

On the 30th day of June, 1870, a meeting of the legal voters and tax-payers of the town was called and held, the notice of which meeting was as follows :

" To vote for or against subscribing twenty thou-
" sand dollars to the *Kankakee and Indiana* Railroad
" Company, and rescinding the vote donating $25,000 to
" the C. D. V. R. R. Co., on November 20, 1869, ON
" CONDITION that said Kankakee and Indiana R. R. Co. Rec. p. 12.
" run said road from LaFayette, Ind., to Kankakee, Ill.,
" through the town of Concord and build a depot and side
" track, in said town, by June 30, 1871," &c.

The following is a copy of the ballot used at said meeting :

" For the tax of $20,000, as a subscription to the capital
" stock of the Kankakee and Indiana Railroad, in lieu of
" the $25,000 voted on the 20th day of November, 1869,
" to the Chicago, Danville and Vincennes Railroad, ON
" CONDITION that said road, depot and side track is com-
" pleted in one year from the date of this election in the
" village of Concord."

Upon a canvass of the votes, it appeared that ninety-two votes were cast *for the subscription*, and twenty-eight votes against.

In reference to this election it will be seen:

1st. That the ballot was not for *rescinding* the vote for $25,000 to the Chicago, Danville and Vincennes road, but only " for *subscribing* $20,000 *to the LaFayette and Kanka-*
" *kee road.*"

2d. That even if it be deemed a vote of rescission, it was only a CONDITIONAL ONE. It was only to take effect *upon the condition that the Kankakee and Indiana Company should build a road through the town of Concord within a*

year. This was never done, and there is nothing *in the record showing* that the condition was complied with.

Thus the vote of June 30th, 1870, never took effect, and in no way rescinds or affects the donation of $25,000 to the Chicago, Danville and Vincennes road, under the previous election of the 20th of November, 1869, and the town authorities so treated it, by subsequently issuing the bonds in question, to the Chicago, Danville and Vincennes road, in November, 1871, ignoring the conditional vote of June 30, 1870.

The bonds when offered in evidence on the trial, were objected to by the defendant, for the reason that the date had been altered by erasing the word October, and inserting June. The alteration was thereupon explained, by
Re Rec. p. 12. showing that it was made in the presence and with the consent of the supervisor of the town, at the time he delivered the bonds to the officers of the railroad company, so as to make the time of the maturity of the bonds and interest coupons coincide; and the company then paid to the supervisor $725, the amount of interest accrued from the first of June previous.

The case was tried by the court without the intervention of a jury, under a written stipulation of the parties. The court found generally for the plaintiff upon the evidence, *without making any special finding of facts.*

The defendant below entered a motion for a new trial,
Rec. p. 8. but failed to appear and prosecute the motion, although
Abs. 20. duly notified, and judgment was thereupon entered in favor of the plaintiff, for the amount due upon the coupons.

ARGUMENT.

All the material questions arising upon this record, have been, as we think, so often passed upon, and decided by this court, that we do not feel justified in trespassing upon the time of the court, to any greater extent than to refer

to a few of the adjudicated cases, and shall confine ourselves, principally, to a very brief consideration of the objections urged by the plaintiff in error, against a right of recovery upon the coupons in suit.

We shall endeavor to show, that as against a *bona fide* purchaser of municipal bonds and coupons, before maturity, none of the objections relied on by the plaintiff in error, are admissible or competent as grounds of defence; and that even if the suit were between the original parties, the railroad company and the town of Concord, the defence could not be maintained.

By a long line of adjudications, extending from 21st Howard, to the present time, this court has established as a fundamental principle, applicable to the class of bonds now under consideration: *First.* That they stand upon the same footing as commercial paper in respect to the defences that may be set up against them in the hands of innocent holders for value, and *Secondly*, the general rule that where there is existing legislative authority under and by virtue of which a municipality has power to create a corporate obligation by the issue of its bonds, and the bonds are issued by the proper officers of the corporation, reciting on their face that they are executed pursuant to the statute authorizing the issue, that then, in the hands of a *bona fide* purchaser before maturity, they are valid obligations, however irregular or defective may have been the proceedings antecedent to, and under which they were issued.

We will refer briefly to a few of the cases.

In *Gelpcke* v. *City of Dubuque*, 1 Wall., on page 203, Mr. Justice SWAYNE says:

"When a corporation has power, under any circum-
"stances, to issue negotiable securities, the *bona fide* pur-
"chaser has the right to presume they were issued under
"the circumstances which gave the requisite authority,
"and they are no more liable to be impeached for any

" infirmity, in the hands of such a holder, than any other " commercial paper."

In *Rogers* v. *Burlington*, 3 Wall., 654, the Court held, that power to issue the bonds being shown, a municipal corporation is estopped, as against *bona fide* holders of them for value, to deny that the power was properly exercised.

In *Moran* v. *Commissioners of Miami Co.*, 2 Black., 724, Mr. Justice SWAYNE, referring to the leading case of *Commissioners of Knox County* v. *Aspinwall*, 21 How., says : " Our answer and judgment was that the bonds " on their face import a compliance with the law under " which they were issued; and that the purchasers of them " were not bound to look further for evidence of a com- " pliance with the conditions annexed to the grant of " power to issue them."

Mr. Justice CLIFFORD, in the case of *Supervisors* v. *Schenck*, 5 Wall., 772, reiterates the rule laid down in *Gelpcke* v. *City of Dubuque*, and in nearly the same language. He says : " Where a corporation has power, " under any circumstances, to issue negotiable securities, " the decision of the Court is that the *bona fide* holder has " a right to presume they were issued under the circum- " stances which give the requisite authority, and they are " not liable to be impeached for any infirmity in the hands " of such a holder."

The same principle was recognized in *Pendleton County* v. *Amy*, 13 Wall., 297; and again in 14 Wall., 296, *City of Lexington* v. *Butler*, the Court say : " Admitted as it is, " that the corporation defendant possessed the power to " subscribe for the stock, and to issue the bonds, it is clear " that the plaintiff is entitled to recover upon the merits, " as the repeated decisions of this Court have established " the rule that when a corporation has power, under any " circumstances, to issue negotiable securities, the *bona* " *fide* holder has a right to presume that they were issued

"under the circumstances which give the requisite "authority, and that they are no more liable to be im- "peached for any infirmity, in the hands of such a holder, "than any other commercial paper."

And in *Moran* v. *Commissioners of Miami Co.*, 2 Black., 724, already cited, it is said: "Corporations are bound "as strongly as individuals are to a careful adherence to "truth in their dealings with mankind, and they cannot, "by their representations, or silence, involve others in "onerous engagements, and then defeat the calculations "and claims their own conduct has superinduced."

It is unnecessary to multiply these authorities, all of which are so familiar to the Court.

We do not claim that a corporation, whether municipal or private, can create an obligation in the absence of a law authorizing it to do so; and purchasers, not less than original parties, must take notice, at their peril, of the existence or non-existence of legislative authority to create the obligation. But the existence of the authority, *and the regularity of its exercise* by corporate officers, are two very different questions.

And herein, we respectfully submit, lies the fallacy of the argument of the learned counsel for the plaintiff in error. They have not distinguished between the authority itself, and the manner of its exercise.

Now it cannot be denied that the 4th section of the act of March 24, 1869, gave the town of Concord authority to borrow money, and issue its bonds therefor, in aid of the Chicago, Danville and Vincennes road.

That section is as follows:

"The authorities of any township, town or city, having "voted to contribute aid in the construction of said rail- "road, [the Chicago, Danville and Vincennes,] may bor- "row money to promptly meet such contribution, and "issue bonds of such township, town or city, at a rate of "interest not exceeding ten per centum, payable annually,

" or semi-annually, as they may deem best, and may nego-
" tiate the same on such terms as they may deem advis-
" able, and may make the same payable at such place or
" places, and at such time or times as they may deem for
" their best interests, and shall have power to levy and
" collect such taxes as may be necessary to pay accruing
" interest, or pay the principal sum."

What, then, are the grounds of objection urged by the plaintiff in error against the right of recovery in the present suit ?

They are three-fold :

First. That the donation was conditional, the condition being that the railroad company should build its road through the town of Concord, which, as is claimed, it failed to do.

Second. That the vote of the town in November, 1869, authorizing the donation, was rescinded at the election held June 30, 1870; and

Third. That the vote was to raise money by tax to be donated to the road, and not to issue bonds.

It will be seen that none of these objections go to the want of *legislative authority* on the part of the town to issue the bonds in question. Plainly they all point to the manner in which the authority was exercised, and not to the existence of the authority itself. They relate to certain conditions and preliminary steps to be performed by the town, antecedent to the issuing of the bonds, and therefore, come within the rule of exclusion as against the rights of *bona fide* purchasers.

Whether the condition of the vote that the road should run through the town of Concord was complied with, or whether the vote was for tax instead of bonds, or whether there was, in fact, any vote, are matters that were unknown to the purchasers of the bonds, and about which they were not bound to inquire. It is sufficient that they saw an ex-

isting law authorizing the town to issue the bonds, and that they found the bonds on the market, duly executed, and purporting to be issued in conformity with the law. If they were required to make any further inquiry, what was it, and where could they safely stop ? Must they inquire as to whether the petition for the election was signed by twelve freeholders ? Or whether the notices were pubblished twenty days prior to the election, or any other such like preliminary matters ?

These questions have been so repeatedly answered in the negative by the decisions of this court, that it seems idle to ask them, and we might well stop here.

The bonds were issued, and were put upon the market. There was, confessedly, a law under which they might be issued. They bore upon their face a statement that they were issued pursuant to the law, and that the faith and credit of the town was pledged for their payment. The Portsmouth Savings Bank finding them upon the market, bearing every indicia of validity, and also finding ample legislative authority for their issue, purchased them before maturity, paying full value.

We could, therefore, rest securely upon the protection which the law gives us, as *bona fide* purchasers, without proceeding further.

But, if it were necessary, it would not be difficult to show that, even were this a suit between the original parties, the attempted defence would have no foundation to rest upon.

The objections, urged by the counsel for the plaintiff in error *are based upon an entire misconception of the facts* :

1st. It is claimed by them that the original vote, donating $25,000 to the Chicago, Danville and Vincennes Railroad, at the town meeting held November 20th, 1869, was rescinded at the meeting held June 30, 1870.

The fact is otherwise, as the record discloses.

The notice of the election of June 30, 1870, at which it is

claimed the former vote was rescinded was as follows: "to "vote for or against subscribing $20,000 to the Kankakee "and Indiana Railroad Company, and rescinding the vote, "donating $25,000 to the Chicago, Danville and Vincennes "Railroad Company, cast at an election held on the 20th
Rec. p. 13. Abs. 29. "day of November, 1869. *On condition that the said "Kankakee and Indiana Railroad Company run said rail-"road from La Fayette, Indiana, to Kankakee City, Illinois, "through the town of Concord, * * and build a side-"track and depot, &c., within one year from the date of this "election*, to wit: the 30th day of June, 1870, and to have "the cars running the whole route in the same time."

The ballot used at the election was as follows: "For "the tax of $20,000, as subscription to the capital stock of "the Kankakee and Indiana Railroad Company, in lieu of "the $25,000 voted on the 20th day of November, 1869, "to the Chicago, Danville and Vincennes Railroad, *on "condition* that said road, depot and side-track is com-"pleted in one year from the date of this election, in the "Village of Concord."

Now, even should it be considered that the ballot used ought to be construed as a vote *to rescind* the former donation, yet, *both the ballot and the notice of the election were conditional* and not absolute.

Whether it was ever to take effect, depended upon the building of the Kankakee and Indiana Road. That road never was built. The condition upon which the vote was given having never happened, the vote never took effect. More than a year had elapsed after that election when the bonds were issued to the Chicago, Danville and Vincennes Road. The town authorities, properly and necessarily, ignored that election. To have done otherwise would have been a misdemeanor in office.

Thus the objection of the counsel for the plaintiff in error, that the vote of November 20th, 1869, donating the $25,000 to the Chicago, Danville and Vincennes Road, was

rescinded by the election of June 30, 1870, has no foundation, in fact, to rest upon, and falls to the ground.

2d. The next objection urged is, that "the Chicago, "Danville and Vincennes Railroad never did run through "the Village of Concord or on its boundaries, and to and "through the town of Sheldon, and hence the condition "upon which aid was voted by the Town of Concord, was "never fulfilled by this company."

The entire groundlesness of this objection is patent, as the most cursory examination of the facts, recited in the bill of exceptions, will show.

The facts are in brief, that the Chicago, Danville and Vincennes Co. located its line of road, and obtained the right of way, from the City of Chicago southerly and within the limits prescribed by its charter, passing through St. Anne's, and thence southeasterly through the towns of Concord and Sheldon, as shown in the diagram, on page 13 of the printed record. That the company graded, bridged and tied the road through the towns of Concord and Sheldon, when they arranged with the Cincinnati, La Fayette and Chicago Company to finish the road and run it in connection with the Chicago, Danville and Vincennes Road to Chicago, the gross earnings to be divided between the two companies in certain specified proportions. The road, as thus completed, was in operation, and cars running thereon at the time of the issue and delivery of the bonds in question to the Chicago, Danville and Vincennes Road. Rec. p. 13.

The mere statement of the facts furnishes a sufficient answer to the objection urged. The right of way was obtained by the Chicago, Danville and Vincennes Company, and under its charter, the road was graded, bridged and tied by the company, through the towns of Concord and Sheldon, and then they procured its completion by another company. The town got the road in exact accordance with the condition of its donation, and the road was no less the Chicago, Danville and Vincennes Railroad, because of

the circumstance that the company procured a portion of the work to be done through the instrumentality of another road. *Qui facit per alium facit per se*, applies in full force.

The road was built and completed under their charter, and in legal contemplation by them.

The fact that the company subsequently built a second line from St. Anne's due south, which passed along parallel with the west line of the town, at a distance of two and a half miles from it, in no way changes the aspect of the case, except that we might claim, and with entire confidence in its correctness, that under the 5th Section of the Act of March 24, 1869, this latter line was a sufficient compliance with the condition of the donation. That section provides :

"In all cases when any township, town or city shall "have voted to contribute any aid, as herein above pro- "vided, toward the construction of said railroad [the C., "D. & V.], the amount or amounts so voted shall become "due and payable *as soon as said railroad shall be completed* "*into or opposite any such township, town or city.*

The proof shows that the second line from St. Anne's runs along opposite the town its whole length, at a distance of about two and a half miles, and, if it were necessary, we should claim that this brings the case within the clear intention of the statute. Indeed the act was passed to meet this precise class of cases.

But another and conclusive answer is found in the record of the town itself, which expressly acknowledges the fulfilment of the condition.

The record is as follows :

"STATE OF ILLINOIS, *Iroquois County*, ss.

"Be it remembered, that on the 9th day of October, A. "D. 1871, the Supervisor and Town Clerk of the town of "Concord, in said county, in pursuance of law, proceeded "to execute township bonds, numbered from 1 to 25 con- "secutively, for $1,000 principal each, with interest cou-

" pons, ten attached to each bond of one hundred dollars
" each, payable yearly at ten per cent. on the principal for
" ten years from the first day of June, 1871, in favor of the
" Chicago, Danville and Vincennes Railroad Company, *in* Rec. p. 11.
" *consideration of said company having run their road*
" *through the villages of Concord and Sheldon*, and in ac-
" cordance with the vote of Concord Township, cast on
" the 20th day of November, A. D. 1869, donating $25.000
" in aid of said company, on the conditions above stated.
" Said bonds delivered by me.

" GEORGE R. DUNNING,
" *Supervisor.*

" EDW'D D. BOONE, *Town Clerk.*"

Thus the town in the most solemn manner proclaimed to all the world that the condition of the donation had been complied with ; and cannot now be heard to say that the fact is otherwise.

The principle of Estoppel clearly applies, and it would be strange if the town should now be permitted to come into court and allege the fact to be contrary to the statements of its own records.

3rd. The third objection urged by the plaintiff in error, is that the vote was to raise money by a tax, and not a vote to issue bonds.

We submit first, that the power conferred upon towns by the act of March 7th, 1867, is not limited to a *present money donation.* The language of the act is : " Are
" hereby severally authorized *to appropriate such sum of*
" *money* as they may deem proper, to the Chicago, Dan-
" ville and Vincennes railroad company, to aid in the con-
" struction of the road of said company.

" § 2. The authorities of said townships, towns, &c.,
" are hereby authorized and required to levy and collect a
" tax, *and make such provisions* as may be necessary and
" proper, for the prompt payment of the appropriation
" under the provisions of this law."

Can it be doubted, that under the language of this statute, it is competent for a town to make provision for a donation by loaning its credit through the issue of its bonds or otherwise, as it may deem best? The 2d section evidently contemplates the raising of money to pay the donation in such manner as the authorities may deem best.

But if there be any doubt as to the true construction of that statute, the subsequent act of March 24, 1869, gives express authority. The act is entitled, "*An act to enable "towns, townships and cities along the line of the Chicago, "Danville and Vincennes railroad, to contribute towards "the construction of said railroad.*"

The 4th section provides that "the authorities of any "town, &c., having voted to contribute aid to the construc- "tion of said railroad, may borrow money to promptly "meet such contribution, and issue bonds of such town, "&c., and may negotiate the same on such terms as they "may deem advisable, * * * and shall have power to "levy and collect taxes to pay accruing interest, or to pay "the principal sum."

No one will doubt that this statute gave ample authority to issue the bonds in question.

The vote of November 20, 1869, was not merely a vote in favor of levying a tax—it was also a vote *donating* $25,000 *to the Chicago*, Danville and Vincennes railroad. It was an *appropriation* of a designated sum to aid in the construction of that road; and if the town acting through its officers, deemed it for its best interests, that the appropriation should be paid by the issue of its bonds, and the railroad company was willing to accept them in lieu of the money, the 4th section of the act of March 24th, 1869, gave them express authority to do so.

The issue and delivery of the bonds to the company, paid the appropriation, leaving the town at liberty to collect the amount in two years by tax, as authorized by the vote,

or to extend it over a period of years, as might be deemed best.

And even in the absence of express legislative authority, the doctrine is well settled that a municipal corporation which has authority to create a debt or obligation, has inherent power to provide for its payment, and to issue the necessary evidences of the debt, payable in the future, as may be agreed upon.

The City of Galena v. *Corwith*, 48 Ill., 423, and cases cited.

From the considerations above suggested, we should contend that, even if this were a suit upon the bonds by the Chicago, Danville and Vincennes Railroad Company, to whom they were issued, the defence now set up would be unavailing. We submit that all the antecedent steps and conditions were, in fact, complied with, and that, upon a refusal to execute the bonds, the railroad company would have been entitled to a mandamus against the town authorities to compel it.

But when we turn to consider the rights of the *bona fide* purchasers of these bonds, it seems to us that none of the objections urged by the defendant can stand a moment's scrutiny. None of them touch the question of the POWER of the town to issue the bonds. The town had unquestionable legislative authority to issue just such bonds as these. It did issue and deliver them, making a record of the issue upon its town books, and they were put upon the market and sold to *bona fide* purchasers for full value paid. Some of them were bought by the plaintiff without any suspicion that they were affected with any infirmity, and, according to the principles enunciated in all the adjudications of this court, we think the plaintiff's right to recover is placed beyond controversy or doubt.

The case of *Marsh* v. *Fulton Co.*, 10 Wall., 676, has been quoted as in conflict with the prior decisions of this

court. We submit, with deference, that a careful examination of that case will show that there is no necessary conflict, so far as the material point in the case was involved, but, upon the contrary, it will be found to be in substantial harmony with both the previous and subsequent adjudications of this court. The only material point decided by the court was, that it was a case where the power to contract never existed, and not that the power was irregularly exercised. That this is so, is evident from the case cited by Mr. Justice FIELD in delivering the opinion, (*Floyd's acceptances*, 7 Wall., 676,) where it was held that certain acceptances made by the Secretary of War in payment of services to be *subsequently rendered to the government* by Majors and Waddell, were null and void, the decision being placed expressly upon the ground that there was no law authorizing pre-payment for service to be rendered to the government *in futuro*.

The court said :

" The transactions by which these drafts were accepted " were in direct violation of this law, [the Act of January " 31, 1823,] and of the limitations which it imposes upon " all officers of the government. Every citizen is supposed " to know the law," etc.

Justice FIELD, in the *Fulton County* case, says : " It is " a case where the power to contract never existed," but adds, " it is a case, too, where the holders of the bonds " were bound to look to the action of the officers of the " county to ascertain whether the law had been so far fol- " lowed by them as to justify the issue of the bonds. The " authority to contract must exist before any protection to " an innocent purchaser can be claimed by the holder."

It is fairly presumable that when the learned Judge speaks of the duty of the bondholders to look to the action of the officers of the county, he refers to the necessity of their ascertaining whether the officers *had issued bonds under some legislative authority giving them the power to act*, and not

that the bondholders are required to ascertain whether the preliminary steps in executing the power had all been complied with. That this is the true interpretation of his language would seem evident from the fact that he does not profess to overrule or qualify the numerous former decisions of the court, and also from the subseqent decisions in 13 and 14 Wallace, all of which are wholly inconsistent with any other interpretation of his language. The cases in 13 and 14 Wallace, following so soon after, reaffirm the doctrine laid down in all the cases preceding the 10th Wallace, and holds that where there is legislative authority, a *bona fide* purchaser is not bound to inquire as to the performance or non-performance of conditions, or as to other antecedent irregularities which may have occurred in the exercise of the power.

If the court intended, in 10 Wallace, to overrule its former decisions, would it not be most extraordinary that it should do so without noticing or referring to them? And no less remarkable that it should so soon afterwards in 13 and 14 Wallace, reaffirm its former decisions without noticing 10 Wallace?

By all just rules of interpretation we are, therefore, bound to give such a construction to the Fulton County case as to make it harmonize with the numerous other decisions of this court.

We will only add a quotation from the opinion of the learned Judge, when deciding this case in the court below. He says:

"The evidence further discloses the fact that these "bonds, after having been delivered to the railroad com- "pany, authenticated by the sworn certificate of the su- "pervisor of the town that the conditions precedent upon "which the donation was made had been complied with, "and that all the prerequisites to authorize the delivery of "the bonds and their registration had been performed on "the part of the railroad company, were taken to the of-

" fice of the Auditor of State, and there endorsed with the " certificate that they were duly registered, and then the " bonds were sold in the open market, in New York city, " for value; and it appears that the present holders pur- " chased them at very near par. The bonds bore upon " their face a recital that they were issued under, and by " virtue of, an act of the Legislature, to which I have re- " ferred. There was an election held on the 20th day of " November, 1869, at which the legal voters of the town " voted to donate $25,000, to aid the construction of the " road, on condition that it was built through the towns of " Concord and Sheldon. The road, or, as I may term it, " a branch of the road, was built through the towns in " conformity with the condition of the vote. The evidence " is ample to show that the officers of the town treated " and considered the construction of the line through the " town of Concord as equivalent to the construction of the " road of the company. Why, then, may it not truthfully " be said that this company has complied with the condi- " tion of the vote?

" Again, the second section of the act of March, " 24th, 1869, provides specifically that the road may be " aided by donations, although it does not run through or " into the town, if it runs 'along' the town. The lan- " guage of the act is, 'the legal voters of any town, town- " 'ship,' etc., 'along the line of such railroad, whether such " 'road shall run into or through such town or township, or " 'not, may by a vote make donations,' &c. A purchaser of " these bonds in the market saw upon their face a recital " that they were issued in pursuance of this act of the " Legislature, which gave the town ample authority to is- " sue the bonds, even if the railroad did not run through " the town; and a purchaser, investigating into the facts " on the ground, would have seen, as a matter of fact, that " the railroad company was engaged in the construction " and operation of a railroad through the town itself.

" Thus, the aid was voted under an existing law, the " donation formally accepted by the railroad company, the " conditions of the vote complied with, the bonds issued " and duly registered, delivered to the company, put upon " the market, and sold to innocent purchasers. The offi- " cers of the town have authenticated the bonds by their " official certificate, stating that all the prerequisites had " been complied with. It seems to me, therefore, that " the town is estopped from now saying that these condi- " tions precedent had not been performed; that the doc- " trine of estoppel must be applied in this case, if it is ever " applied."

In couclusion, we submit that the entire defence to the collection of these coupons is without any merits, legal or otherwise;

That none of the points made by the plaintiff in error are new;

That they have been repeatedly passed upon in former adjudications of this court;

That the conditions, upon which the aid was voted, were fully performed, and the town got the road precisely as agreed;

That it is matter of common notoriety, that the construction of the road more than doubled the value of the lands in the town of Concord, which had theretofore been without railroad facilities.

We are, therefore, justified in claiming that the appeal is prosecuted for the purpose of delay, and to subject the owner of the coupons to additional expense; and we respectfully ask that damages be awarded to the defendant in error, in the discretion of the court.

ISAAC G. WILSON,
SANFORD B. PERRY,
Atty's for Def't in Error.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1875.

No. 43

THE TOWN OF CONCORD, PLAINTIFF IN ERROR,

vs.

THE PORTSMOUTH SAVINGS BANK, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR

Upon the re-argument ordered by the Court upon the question as to whether or not the bonds in controversy were prohibited by the constitution of the State of Illinois, and are therefore void.

GEO. H. WILLIAMS,
For Plaintiff in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1875.

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vs.

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BRIEF FOR PLAINTIFFS IN ERROR

Upon the re-argument ordered by the Court upon the question as to whether or not the bonds in controversy were prohibited by the constitution of the State of Illinois, and are therefore void.

STATEMENT.

On the 7th of March, 1867, the Legislature of Illinois passed an act entitled—

"An act to authorize cities, towns, or townships, lying within certain limits, to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville, and Vincennes railroad." (Vol. 1, Laws 1867, p. 842.)

Power was given in said act to said cities, towns, or townships, including the town of Concord, as follows:

"To *donate such a sum of money* as they may deem proper to the Chicago, Danville, and Vincennes Railroad Company,

appropriate

to aid in the construction of the road of said company, to be *paid to said company as soon as the track of said road* shall have been located and constructed through said city, town, or township, respectively: *Provided, however*, that the proposition to appropriate moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns, or cities, at a regular, annual, or special meeting, by giving at least ten days' notice thereof, and a vote shall be taken thereon, by a ballot, at the usual place of election; and, if a majority of the votes cast shall be in favor of the appropriation, then the same shall be made—otherwise not."

"SEC. 2. The authorities of said townships, towns, or cities, respectively, are hereby authorized and required to levy and collect a tax, and make such provisions as may be necessary and proper for the prompt payment of the appropriation, under the provisions of this law."

On the 24th of March, 1869, the Legislature of Illinois passed another act, the material parts of which are as follows, (Laws of 1869, vol. 3d, p. 359:)

"SEC. 2. The legal voters of any town, township, or city along the line of said railroad, whether said railroad shall run into or through said town, township, or city or not, may, by a majority of the legal voters voting at any election held for the purpose, make appropriations or *donations* to aid in the construction of said railroad, and the proper authorities shall levy and collect taxes in the manner that other taxes are levied and collected to properly meet any obligations assumed under and by virtue of this act.

"SEC. 3. The votes at any election held in any incorporated town or city, for the object herein mentioned, shall be canvassed and returned as at any other election in said town or city; and in all cases the notices given shall specify particularly the amount to be voted for or against at such election, *and in no case shall the appropriation exceed the amount specified in the notice or notices.*

"SEC. 4. The authorities of any township, town, or city (such township, town, or city having voted to contribute aid in the construction of said railroad) may borrow money to promptly meet such contribution, and issue bonds of such township, town, or city, at a rate of interest not exceed-

ing ten per centum per annum, payable annually or semi-annually, as they may deem best, and may negotiate the same on such terms as they may deem advisable, and may make the same payable at such place or places, and payable at such time or times as they may deem for their best interests, and shall have power to levy and collect such taxes as may be necessary to pay accruing interest, or pay the principal sum.

"SEC. 5. In all cases when any township, town, or city shall have voted to contribute any aid, as hereinbefore provided, toward the construction of said railroad, the amount or amounts so voted shall become due and payable as soon as said railroad shall be completed into or opposite to any such township, town, or city."

At a special meeting of the legal voters and tax-payers of the town of Concord, duly called and held on the 20th day of November, 1869, the town voted in favor of levying a tax on the taxable property of said town of Concord, amounting, in the aggregate, in two years, to the sum of twenty-five thousand dollars *to be donated* to the Chicago, Danville and Vincennes Railroad Company, provided the company should run its road through the villages of Concord and Sheldon, and to take such measures in pursuance of law as may be considered necessary to carry the objects of said meeting into effect.

On the 20th day of June, 1870, the railroad company filed, in the town clerk's office, a written notice of his acceptance of the donation, the same being addressed to the supervisor and town clerk. (Record 11.)

A meeting of all legal voters and tax-payers of the town of Concord was duly called and held on the 30th day of June, 1870, the notice of which meeting was in substance as follows: "To vote for or against subscribing twenty thousand dollars to the Kankakee and Indiana Railroad Company, and *rescinding the vote donating* twenty-five thousand dollars to the Chicago, Danville and Vincennes Railroad Company, on November 20, 1869, on condition that said Kankakee and Indiana Railroad Company run said road from Lafayette, Indiana, to Kankakee, Illinois, through the town of Concord, &c., and build a depot and side-track in said town, by June 30th, 1871," &c.

The following is a copy of the ballot used at said meeting:

"For the tax of $20,000 as *subscription* to the capital stock of the Kankakee and Indiana Railroad in lieu of the $25,000 voted on the 20th day of November, 1869, to the Chicago, Danville and Vincennes Railroad, on condition that said road, depot, and side-track is completed in one year from the date of this election, in the village of Concord."

The record of the election shows that "upon a canvass of the votes, ninety-two votes were cast for the *subscription*, and twenty-eight votes were cast against the same; said ninety-two votes being a clear majority of the legal votes of said township." (Record, 13.)

On the 9th day of October, A. D. 1871, the bonds in question were issued, and contained the following recital:

"This bond is issued under and by virtue of a law of the State of Illinois, to authorize cities, towns or townships lying within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville and Vincennes Railroad, and the faith of said township of Concord is hereby pledged for the payment of said principal sum and interest as aforesaid." (Record, 5.)

Section 5 of article 9 of the Constitution of 1848 of Illinois is as follows:

"The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for *corporate purposes*, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." (Gross Statues, 37.)

Section — of Article — of the Constitution of Illinois, which took effect July 2, 1870, is as follows:

"No county, city, town, township, or other municipality, shall ever become *subscriber to the capital stock* of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such *subscriptions*, where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." (Gross Statutes, 59.)

Assignment of Errors.

The court below erred in overruling the objections of plaintiff in error to the bonds and interest coupons.

2d. Said court erred in admitting said bonds and interest coupons in evidence.

3d. Said court erred in overruling the objection of plaintiff in error, that said bonds were issued without any power or authority to issue them.

4th. Said court erred in rendering judgment for defendant in error.

Argument.

The bonds in question were void as well by the Constitution of 1848, as by the constitution of 1870.

The tax payers of Concord voted in favor of levying a tax on the taxable property of the town, amounting in the aggregate in two years to the sum of $25,000 *to be donated* to the Chicago, Danville & Vincennes Railroad Company, provided the company should run its road through the villages of Concord and Sheldon.

Provision is here expressly made:

1st. As to the mode and time in which the money is to be raised.

2d. That it shall not exceed the sum of $25,000.

3d. That it shall be *donated* not absolutely to the company but upon condition.

This vote was under and in pursuance of the act of 1867, and the provisions of the act of 1869 are not applicable to it.

The act of 1867 only authorized a town to *donate a sum of money* to a railroad company when the track of its road shall have been located and constructed through such town.

The act of 1869 authorizes a *donation* by a town to a railroad company, whether its railroad shall run into or through said town or not.

The act of 1867 requires the *donation* to be raised by a tax, but the act of 1869 allows the town authorities to borrow money upon bonds with which to pay the *donation.*

The bonds show upon their face that they were issued "under and by virtue of a law of the State of Illinois to authorize cities, towns or townships lying within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville & Vincennes Railroad."

This is a literal recital of the title to the act of 1867.

The act of 1869 is entitled "An act to enable towns, townships, cities and counties along the line of the Chicago, Danville & Vincennes Railroad, to contribute towards the construction of said road."

It is evident that this act of 1867 was intended for one class, and the act of 1869 for another class of municipalities. There can be no pretence of power to issue bonds under the act of 1867.

Whatever else may be inferred from said act of 1869, it can hardly be supposed that the Legislature intended to deny to the people of a town the right to refuse a *donation* to said company, or to make a *donation* upon a condition, or to limit the sum *donated;* or to provide for its prompt payment by taxation; but if the Legislature did intend by said act to impose upon the people of any town without their consent, pecuniary burdens or obligations for the benefit of said railroad company, then to that extent said act is unconstitutional and the proceedings thereunder are void and of no effect.

It is confidently submitted that the Legislative Assembly of Illinois had no constitutional power in 1869 to confer upon the supervisor and town clerk of the town of Concord

authority to issue as a *donation* to the Chicago, Danville and Vincennes Railroad Company bonds in the name of said town for $25,000, bearing interest at the rate of ten per cent. per annum, running ten years, and amounting to $50,000, without the consent of the people of said town, and especially so after they had expressly voted not only to limit their *donation* to $25,000, but that it should be paid by a tax to be raised within two years.

No Legislature has the right or power by any form of procedure to take the property of the people of a town without their consent, and give it to a railroad company.

The people of the town of Concord never consented to give the Chicago, Danville and Vincennes Railroad Company $50,000.

They never consented to any indebtedness for ten years, or to any bonds bearing ten per cent. interest during that time.

They not only did not consent, but they expressly decided not to create any such obligations or indebtedness.

That under the constitution of 1848 the Legislature of Illinois had no power to confer upon the supervisor and town clerk of a town authority to impose an indebtedness upon the people thereof without their consent is expressly decided by the supreme court of that State in the case of Marshall *vs.* Silliman, (61 Illinois, 226.) The court say:

"So of the supervisor and town clerk, though elected by the people they were not elected for the purpose of creating a debt or imposing a tax, and the Legislature could not clothe these two officers, without the consent of the people, with a discretionary power of taxation, or of creating a debt because they are not by themselves the corporate authorities in the sense of the constitution."

Hepler *vs.* Drainage Commissioners, 53 Illinois, 110.
Livingston *vs.* Miller, *Id.*, 302.

When the Legislature empower a supervisor and town clerk to issue bonds as a *donation* to a railroad company,

Town Appropriation in Tolleka
20 Wallace 663

without the consent of the people, said officers act as the agents of the Legislature alone. They are not invested with any such power by their election. They arbitrarily, by an order of the Legislative Assembly, take the property of the people of a town and give it to the company.

By referring to the constitution of 1848, it will be seen that the corporate authorities of a town can only be vested with power "to assess and collect taxes for *corporate purposes.*"

To assess and collect taxes for a *donation* to a railroad company can only be held to be within this power by the most latitudinarian construction of this clause, but to hold that under it the legislature may vest the supervisor and town clerk of a town, contrary to the expressed will of the people thereof, with power to create an indebtness for such town by *donating*, interest bearing obligations, to a railroad company, is to treat the said constitutional provision as a mere nullity.

But the bonds in question were absolutely prohibited by the constitution of 1870.

1st. Because when they were issued there was no vote of the people of Concord authorizing that or any other *donation* to the railroad company. The vote of November 20th, 1869, was rescinded by the vote of June 30th, 1870. The language of the notice for the election, June 30th, 1870, is:

"To vote for or against *subscribing* $20,000 to the Kankakee and Indiana Railroad Company, and *rescinding* the vote *donating* $25,000 to the Chicago, Danville, and Vincennes Railroad Company, on November 20th, 1869, on condition that said Kankakee and Indiana Railroad Company run their road," &c.

Though the phraseology is not altogether clear, it is evident that the rescission was absolute, and that the condition was intended to limit the grant to the Kankakee and Indiana Railroad Company. To transpose the words so as to make the notice read, "To vote for rescinding the vote do-

nating," &c., and "for or against subscribing $20,000, upon condition," &c., would undoubtedly express the will of the voters. They did not intend that both roads, at the same time, should have the right to claim a subsidy from them. This is made clearer by the form of the ballot, as follows:

"For the tax of $20,000 as a *subscription* to the capital stock of the Kankakee and Indiana Railroad Company, in *lieu* of the $25,000 voted on the 20th day of November, 1869, to the Chicago, Danville, and Vincennes Railroad Company, on condition that said road, depot, and side track is completed in one year from the date of this election, in the village of Concord."

One tax was to be in *lieu* of the other, but the *lieu* tax was only to be paid upon the condition specified. To hold that the vote of 1869 was unaffected by the vote of 1870, is to hold that both roads might claim the subsidy voted to each, if both were completed through the town within a year from the last election. This certainly was not contemplated by the people. Probably they had learned, at the time of the last election, that the Chicago, Danville, and Vincennes Company did not intend to run its road through their town, as it did not, and therefore they concluded to divert the subsidy to another company, and change it from a *donation* to a *subscription* for capital stock.

As to the right of the people to rescind a vote, Judge Dillon, in his work on Municipal Corporations, says:

"At any time before the rights of third persons have attached, a council or other corporate body may, if consistent with its charter and rules of action, rescind previous votes. Thus a vote levying a tax, so long as it rests in mere resolution, and has not been acted upon, may be rescinded; and if rescinded, the collector cannot legally proceed to collect the tax." (Sec. 228.)

No right had been acquired on the 30th of June, 1870, by the Chicago, Danville, and Vincennes Company under the vote of November 20th, 1869. Their agreement with another

company to build a road through Concord is dated April 17th, 1871.

Irrespective, however, of the vote of June 30th, 1870, these bonds are prohibited by the constitution of that year.

Its language is:

"No county, city, town, or township shall ever become *subscriber* to the capital stock of any railroad or private corporation, or make *donation* to or loan its credit in aid of such corporation."

This clearly prohibits a *donation* of any nature or description by a town to a railroad company after July 2d, 1870.

If the officers had power to bind the town, then the bonds in question were a *donation* by the town of Concord to the Chicago, Danville, and Vincennes Railroad Company on the 9th day of October, A. D. 1871, and are therefore void, unless they are saved by the proviso to said section.

They are not saved by the proviso.

Three separate and distinct things are prohibited by said section:

1st. The *subscribing* to the capital stock by;

2d. The making of *donations* to;

3d. The *loaning* of its credit by any municipality to a railroad company or private corporation.

They are enumerated because they are so different from each other that no general description could be made so as to embrace them.

When the constitutional provision of 1870 was prepared the idea in the minds of its authors was to interdict everything therein named after a certain date.

The necessity and early adoption of this provision appeared so great that it was submitted to a separate vote of the people.

By reference to the brief of my associates, it will be seen that the provision was absolute, as above cited, when it was reported to the convention, and while under consideration there a member proposed the following, which was adopted:

"Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make *such subscriptions* when the same have been authorized under existing laws by a vote of the people of such municipality prior to such adoption."

No discussion, except a brief speech in favor of it by the mover, was had upon the proviso, and it could not therefore have been understood in the convention as making any great change in the object or effect of the article.

Manifestly, this proviso was simply understood as allowing a municipality that had agreed *to subscribe* to the capital stock of a railroad company or private corporation to execute its contract.

This is the obvious meaning of the words used. "No town, &c., shall ever become *subscriber* to the capital stock of any railroad company," &c.; then comes the proviso, saying the right to make "*such subscriptions* shall not be affected," &c.

"Such," in the proviso qualifying *subscriptions*, excludes the idea of all sorts of *subscriptions*, and limits its operation to the sort of *subscription* before made. That sort is a *subscription* to the capital stock of a railroad company or private corporation.

To *subscribe* to the capital stock of a railroad company includes the idea of an equivalent. Certificates of stock are issued to the *subscriber* to the amount that he pays, or agrees to pay, and to that extent he becomes an owner of the road, and is entitled to dividends if any are declared.

No such idea enters into a *donation*.

If the mover of this proviso had intended to make it as broad as the enacting clause he would have said: "The adoption of this article shall not be construed as affecting the right of such municipality to make such *subscriptions*, *donations* or *loan* of its credit when authorized, &c., instead of simply saying "*such subscription*."

Undoubtedly it was far more odious for a town to *donate*

money to or become an accommodation endorser for a railroad company than to *subscribe* for its capital stock, and therefore the former was left out in order to save the latter.

"*Subscriptions.*"

Under this head the general statutes of Illinois authorize counties and cities to take capital stock in railroad companies. Gross Statutes 552.

Subscriptions, and the taking of capital stock, are equivalent terms in the legislative enactments and judicial decisions of that State.

The same meaning should be given to the word "*subscription*" when carried into this proviso.

There is no general law of Illinois authorizing towns to make *subscriptions* to railroad companies. That power is confined to counties and cities. Some special acts have been passed authorizing towns to aid railroads. The paramount idea, no doubt, was to save what counties and cities had done under the general law.

This is evidenced by what the mover of the proviso said in the convention.

Mr. Justice Story, in delivering the opinion of this Court in the case of the United States *vs.* Dickson, 15 Peters, 165, speaking of a proviso, says:

"Passing from these considerations to another which necessarily brings under review the second point of objection to the charge of the court below, we are led to the general rule of law which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes that when the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso *is construed strictly*, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up such an exception must establish it as being *within the words* as well as within the reason thereof."

Apply this doctrine to the case under consideration and no room is left for controversy. *Donations* are certainly not within the words, nor are they within the intent of this proviso.

But there is another fatal objection to the bonds in question.

Whatever the transaction between the supervisor and town clerk of Concord and the railroad company may be called it is clearly prohibited by said constitutional provision unless it was authorized by a vote of the people of the town.

Adopting the reasonable and just meaning of said provision, without contention as to words, and it takes away from the town authorities all power on their part to enter into pecuniary obligations to railroad companies so as to bind the people of the town, without their consent.

Suppose the vote of 1869 was not rescinded? That was to *donate* a sum of money, to wit, $25,000 to be raised by a tax within two years. *Ex industria*, the idea of a long indebtedness and heavy interest was excluded. Contrary to the expressed will of the people the supervisor and town clerk issued bonds running ten years, and bearing ten per cent. interest per annum, so that every year, for ten years, $2,500 are to be taken from the people of the town and given to the railroad company, after which the principal, $25,000, becomes due. It is palpably and absolutely certain that the people never authorized anything of this kind.

When bonds are issued by a town to a railroad company under a statute authorizing such aid, many presumptions arise in favor of the holder of such bonds so as to effectuate the statute, but when such bonds are issued under a constitution which, with an exception, prohibits their issuance, the presumptions are otherwise so as to effectuate the object of the constitution, and a party claiming upon such bonds must show himself clearly within the exception.

Everybody dealing in bonds issued in Illinois is bound to know the constitution of that State, and, therefore, when

the bonds in question were offered to the Portsmouth Bank, as the constitution of Illinois prohibited their issuance except under special circumstances, it was the duty of the bank to inquire as to whether or not said special circumstances validated these bonds. The records of the town of Concord would have shown that no *subscription* or bonds were even authorized by its people.

Under said constitutional provision the holders of these bonds are chargeable with notice that they were not authorzed by a vote of the people of Concord.

Dillon on Corporations, secs. 419, 426.

GEO. H. WILLIAMS,
For Plaintiff in Error.

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22 Illinois 147
22 Howard 364

IN THE

SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, A. D. 1875.

No. 254.

THE TOWN OF CONCORD, Plaintiff in Error,

—vs.—

THE PORTSMOUTH SAVINGS BANK, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

HENRY S. MONROE, - LEWIS H. BISBEE,

Att'ys for Plaintiff in Error.

CHICAGO:

BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.

1876.

In the

SUPREME COURT OF UNITED STATES.

No. 254.

THE TOWN OF CONCORD, Plaintiff in Error,

—vs.—

THE PORTSMOUTH SAVINGS BANK, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF FACTS.

The bonds upon the coupons, of which this suit was brought in the court below, were, with the coupons, issued on the 9th day of October, 1871.

On the 10th day of November, 1869, notice of a meeting of the voters of the town of Concord was published, in which the legal voters of the town of Concord were notified: "That a special town meeting will be held at "the school house, in the village of Concord, on the 20th "day of November, A. D. 1869, at 9 o'clock A. M., for "the purposes following, to wit: To vote for or against "levying a tax on the taxable property of said town, "amounting, in the aggregate, in two years, to be levied "and collected, as other taxes, to the sum of twenty-five "thousand dollars, to be donated to the Railroad Company

"building the railroad known as the Vincennes, Danville "& Chicago Railroad; *provided*, said Railroad Company "run the said railroad through the village of Concord, or "on its boundaries, and to and through the town of Shel- "don, in Sheldon township."

In pursuance of said notice, an election was held on November 20, 1869, and the legal voters of the town of Concord voted to levy a tax upon the property of the town of Concord, amounting, in the aggregate, in two years, to be levied and collected as other taxes, to the sum of $25,-000, *to be donated* to the Chicago, Danville & Vincennes Railroad Company, *provided said road run* through the village of Concord, or on its boundaries, and to and through the town of Sheldon. As a matter of fact, the Chicago, Danville & Vincennes Railroad never did run "through the "village of Concord, or on its boundaries, and to and through "the town of Sheldon;" and hence the condition upon which aid was voted by the town of Concord, was never fulfilled by this company.

The Railroad Company, never having complied with any of these conditions, in October, 1871, procured the supervisor and town clerk to execute, and the supervisor to bring to Chicago, twenty-five bonds, dated October 1st, 1871. (Transcript, p. 12.)

On the 30th day of May, 1870, notice of an election, or meeting, was given to the voters of the town of Concord, in the following words:

"An election will be held at the school house, in the "village of Concord, on Thursday, the 30th day of June, "1870, to vote for or against subscribing twenty thousand "dollars to the Kankakee & Indiana Railroad Company, "and rescinding the vote donating twenty-five thousand "dollars to the Chicago, Danville & Vincennes Railroad "Company, cast at an election held on the 20th day of "November, 1869, on conditions that the said Kankakee "& Indiana Railroad Company run said railroad from

"Lafayette, Indiana, to Kankakee City, Illinois, through "the town of Concord, in the township of Concord, Iro- "quis County, and State of Illinois, within eighty rods of "the bridge across the Iroquois river, at the said town of "Concord, and to build a side track and a good and suffi- "cient depot in said town, within one year from the date "of this election, to wit: the 30th day of June, 1870, and "to have the cars running the whole route in the same "time.

"And said twenty thousand dollars are to be paid in "township bonds, bearing ten per cent. interest per annum, "in favor of said Company, in full of said subscription, in "ten years from the date of the completion of said rail- "road, and the running of the cars thereon."

On the 30th day of June, 1870, this proposition was voted upon, and carried, by 92 to 28 votes.

The ballot used at this meeting was as follows: "For "the tax of $20,000 as subscription to the capital stock of "the Kankakee & Indiana Railroad, *in lieu* of the $25,000 "voted on the 20th day of November, 1869, to the Chi- "cago, Danville & Vincennes R. R."

On the 2d day of July, 1870, the following became a provision of the Constitution of the State of Illinois, to wit:

"No county, city, town, township, or other municipal- "ity, shall ever become subscriber to the capital stock of "any railroad or private corporation, or make donation "to, or loan its credit in aid of, such corporation; *provided*, "*however*, that the adoption of this article shall not be con- "strued as affecting the right of any such municipality to "make such subscriptions where the same have been "authorized, under existing laws, by a vote of the people "of such municipalities prior to such adoption."

Assignment of Errors.

The court below erred in overruling the objections of the plaintiff in error, to the introduction of the bonds and interest warrants in evidence, for the following, among other reasons :

1st. Because the vote of the people of the town of Concord, on November 20th, 1869, to donate $25,000 to the Chicago, Danville & Vincennes Railroad Company, was rescinded by the vote of the people of said town on the 30th day of June, 1870, and there being no vote of the people of said town, under any law of the State of Illinois, authorizing the issuance of said bonds and coupons, they were void, under the Constitution of Illinois.

Argument.

The issuance of the bonds in question was prohibited by the Constitution of the State of Illinois, and they are, therefore, void.

These bonds were issued on the 9th day of October, 1871.

The Constitution of the State of Illinois, which took effect July 2d, 1870, contains the following provision:

"No county, city, town, township, or other municipality, "shall ever become subscriber to the capital stock of any "railroad or private corporation, or make donation to, or "loan its credit in aid of, such corporation; *provided, how-* "*ever*, that the adoption of this article shall not be con- "strued as affecting the right of any such municipality to "make such subscriptions, where the same have been "authorized, under existing laws, by a vote of the people "of such municipalities prior to such adoption."

Here, subscriptions to the capital stock of railroads, by towns, are prohibited, except in cases where such subscriptions had been authorized under then existing laws, by a vote of the people of such towns.

Donations to, and loans of credit in aid of, *railroads* are absolutely prohibited.

These the proviso does not include.

The distinction between subscriptions to the capital stock of railroad companies, and donations to, and loans of credit in aid of them, in this provision, is plain; and the fact that the proviso includes the one, and is silent as to the others, is, under the rules of construction applicable to statutory and constitutional law, conclusive as to the intention of the convention which enacted this fundamental law.

The history of, and the debates in, that convention, arising upon this provision of the Constitution of the State of Illinois, show, conclusively, that this convention intended to prohibit donations and loans of credit to railroads under any and all circumstances.

The first resolution relative to the subject matter of this provision, introduced in the convention and referred to the committee on municipal corporations, was as follows:

"No county, town, city or village, shall subscribe for "stock in any incorporated company, unless the same "shall be paid for at the time of such subscription; "nor shall any municipal corporation loan its credit to any "incorporated company; nor borrow money for the pur- "pose of taking stock in any such company." No proviso.

(See debates and proceedings of constitutional convention of Illinois, 1870, page 154.)

When this subject came to be considered in committee of the whole, the article submitted read as follows:

"No county, city, town, township or school district, shall "ever become subscriber to the capital stock of any pri-

" vate corporation, or *make any donation to, or loan its* " *credit in aid of any* such corporation."

(See D. & P. C. C. of Ill., 1870, page 1,234. This contained no proviso.)

There being a question as to whether railroad companies were public or private corporations, the article was so amended as to include them.

The question upon the adoption of this article was discussed with great ability, particularly by the few opposed to its adoption. These arguments are found on pages 1,234 to 1,242, inclusive, of the debates and proceedings of the convention. Those in favor of this article are briefly stated by Justice BREESE in *Schall* v. *Bowman*, 62 Ill., page 324, who says, in considering this provision, " the passion for " subscriptions by the municipalities to every conceivable " project presenting itself in a corporate form, was so vio- " lent, and prevailed so extensively throughout our State, " as to demand a speedy, prompt and efficient remedy. " * * * on page 325 : Many of those who vote these " subscriptions, it was well known to the convention and to " everybody else, did not possess a dollar of their own, or " own any property to be taxed, but having the voting " power, they could so use it in furthering such enterprises, " producing, as they do, many jobs and contracts by which " they would profit as individuals, with none of the bur- " dens of the tax payer."

The entire action of the convention shows, conclusively, that it was determined at once and forever to prevent further indebtedness on the part of municipalities incurred in aid of railroad or other corporations.

The debates upon the general proposition involved in this article being concluded, Mr. Hay moved to amend, by inserting the proviso contained in the section as it now stands. (Ibid, p. 1,240.)

Mr. Hay, after reading the amendment, said : " I offer "this amendment for the reason that I apprehend much

"embarrassment might arise as to the application of the "proposed provision of the constitution, (if it should be "adopted,) growing out of existing contracts and existing "relations that have been entered into prior to the adop- "tion of the article.

"Now, the practice, so far as I am aware, has been to "obtain the votes of counties or cities to aid railroads, and "when that has been given, the subscriptions are made, "and the bonds of the corporation issued when the railroad "is completed through the county or city.

"In some places these subscriptions are never made un- "til the railroad is actually completed to or through the "corporation.

"Now, many of the railroad corporations have entered "into contract upon the faith of obtaining this subscription "as soon as a road shall be completed ; and the amend- "ment I propose is to give to corporations the right to ful- "fill these obligations, and thus save embarrassments that "might arise out of the adoption of the article unless that "provision were inserted —I move that as an amendment to "the article." This was the only argument made in favor of the proviso ; none was made against it.

A perusal of these debates, and the action of the convention, will convince any one that an amendment including donations and loans of credit could not have been passed.

Mr. Hay showed his tact and knowledge of the disposition of the members of the convention, by confining it strictly to subscriptions for stock authorized by a vote of the people under the existing law. It will hardly do to claim that he—an eminent railroad lawyer—by accident or mistake omitted donations and loans of credit from this proviso.

He evidently omitted all reference to them, because he well knew that a proviso including them could not be carried.

The convention seemed bound to put an end to towns,

counties and municipalities incurring debt by voting aid, in any way, to railroads.

The proviso was only sustained because certain counties had entered into contracts to subscribe to the stock of railroads which might be building upon them ; and the most careless examination of the debate on this subject will convince the reader that an amendment to this section, including "donations" and loans of credit, could not have been passed.

Besides, the convention might have been willing to include subscriptions to stock in the proviso, while it could not have been induced to include donations and loans of credit. In one case, the town would stand like any other subscriber to stock, and would receive *quid pro quo;* while in the other, the town would be absolutely giving away its money or credit.

We, therefore, say that, by this provision of the constitution of the State of Illinois, *donations* in aid of railroad companies are prohibited.

On November 20th, 1869, the town of Concord voted to levy a tax on the taxable property of the town, amounting, in the aggregate, in two years, to the sum of $25,000, to be levied and collected as other taxes, "to be donated to "the Chicago, Danville and Vincennes Railroad Com-"pany."

The notice of the election and the vote both show this aid to be a donation, and not a subscription to stock. It cannot be pretended that it was anything else.

The bonds in question having been executed and delivered on the 9th of October, 1871, more than fifteen months after the provision of the constitution above quoted took effect, are absolutely void.

II.

If it is thought that *donations* are covered by the proviso, (which we do not think possible,) then we say that nothing is saved by the proviso, which is not *authorized by a vote* of the people.

The proviso reads thus : "provided, however, that the "adoption of this article shall not be construed as affecting "the right of any such municipality to make such subscrip- "tions where the same have been *authorized, under exist- "ing laws, by a vote of the people* of such municipalities "prior to such adoption."

We now say that no vote of the town of Concord ever authorized the issuance of these bonds to this railroad company.

The language of the notice for the election provided for a vote to *levy a tax* of $25,000 upon the town, to be levied and collected in two years. Neither the language of the notice or vote contemplates the issuing of bonds, or the incurring of any permanent debt.

So here is no "vote of the people" of this town in any way authorizing the issuing of these bonds within the meaning of this proviso.

But second, we say that this vote was rescinded.

The record shows, (transcript, page 12,) that a meeting of all the legal voters and tax payers of the town of Concord was duly called and held on the 30th day of June, 1870, "to vote for or against subscribing $20,000 to the "Kankakee and Ind. R. R., *and rescinding the vote* dona- "ting $25,000 to the C., D. & V. R. R. Co., on Nov. 20, "1869."

The ballot used at this meeting was as follows : "For "the tax of $25,000, as subscription to the capital stock of "the Kankakee and Ind. R. R., *in lieu* of the $25,000 voted "on the 20th day of Nov., 1869, to the Chicago, Danville "and Vincennes R. R."

Take the call for the meeting and the vote together, and there can be no possible doubt but that the vote of November 20th, 1869, was, by the people of this town, legally and properly rescinded long before these bonds were issued.

That the town had the power to rescind the vote above referred to, is well settled:

Dillon on Municipal Corp., Sec. 228.
Aspinwall v. *Commissioners Jo. D. Co.*, 22 How, 364.
Stoddard v. *Gilman*, 22 Vt., 568.
Bond v. *Negus*, 3 Mass., 230.
Stine v. Supervisors, 47 Ill., 256.
Beckwith v. *English*, 51 Ill., 147.

We, therefore, say that, even if donations are embraced in the proviso of the section of the constitution above referred to, this one was not, at the time it was made, "authorized under existing laws by a vote of the people" of this town, and hence comes directly within the inhibition of the fundamental law of the State of Illinois.

In *Schall* v. *Bowman*, 62 Ill., 321, it was held that the article in question became a part of the constitution of Illinois on the 2d day of July, 1870.

In *Richards* v. *Donagho*, 66 Ill., 73, the case last cited was affirmed, and its subscription to the stock of a Railroad Co. was held void, although authorized by a vote of the people.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1875.

No. 43.

THE TOWN OF CONCORD, Plaintiff in Error,

vs.

THE PORTSMOUTH SAVINGS BANK, Defendant in Error.

Supplemental Brief for Defendant in Error on Re-Argument.

☞ THIS TO BE READ AS THE FIRST PART OF THE BRIEF FILED ON THE RE-ARGUMENT.

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SANFORD B. PERRY,
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Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1875.

No. 43.

THE TOWN OF CONCORD, Plaintiff in Error,

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Suggestions made in reply to the briefs filed for the plaintiff in error, upon the re-argument of this case ordered by the Court.

In the brief filed by the Hon. George H. Williams for the plaintiff in error, there is a mistake made on page 1 in quoting the act of the 7th of March, 1867. The word *appropriate* should have been used for the word *donate*. Power was given by that act to towns, &c., to "appropriate such a sum of money," &c. The materiality of this lies only in the fact that an effort seems to be made to identify this act as the *sole* one under which the town acted in voting aid to the C. D. and V. R. R. Company, and to exclude the act of 24th March, 1869. The town voted to *donate* a given sum of money. The act of 1869 specifically authorized *donations*, and the act of 1867 *appropriations*. And while the two words in this connection may be in legal effect the same, yet for the purpose of identifying the statutes under which the town acted, if in fact it acted under either to the exclusion of the other, the use of the word *donate* would indicate action under the act of 1869, rather than 1867.

An attempt is made to show that the issue of the bonds in question was prohibited by the Constitution of 1848. This is impossible, for the reason that the Constitution of 1848 is entirely silent on the subject. The Legislature had, and until the adoption of the Constitution of 1870, exercised, full power in this matter; and to the acts of the Legislature only, and not to the Constitution, must we look for the authority exercised by towns in such cases.

It is claimed that the acts of 1867 and 1869 are unlike, and intended for different classes of municipalities. It may, perhaps, be a sufficient answer, to say that there is nothing in the language of the acts to justify this claim.

But a further and conclusive answer to this claim is apparent from the acts themselves.

The act of 1867 authorized the cities, towns or townships, lying within certain limits, on vote of the legal voters, to appropriate moneys to the C. D. and V. R. R. Co. to aid in the construction of the road of the company, the same to be paid to the company *as soon* as the track of the road should be constructed, &c. This having been done, the town authorities were required to levy and collect a tax, and make such provisions as may be necessary and proper for the *prompt* payment of the appropriation.

The act of 1869 (Vol. 3, p. 357, and not 359,) authorized *precisely the same* municipalities as those mentioned in the act of 1867, on the vote of the legal voters, to make appropriations or donations to aid in the construction of the *same* railroad, the amount so voted to become due and payable *as soon* as said railroad shall be completed, &c.

The town authorities are directed to levy and collect taxes to meet any obligations assumed under the act.

So far, the two acts seem to be quite identical in their objects and provisions. But the fourth section of the act of 1869 introduces a new feature, and one important to the town, as the people, until their lands should become enhanced in value by the construction of the road, would not

desire to tax themselves to raise the donation at once. This section authorizes the authorities of the town, where the aid has been voted, to borrow money to *promptly* meet the contribution, to issue bonds of the town, at a rate of interest not exceeding ten per cent., payable semi-annually, and make the same payable *at such time* and at such places as they might deem best, and negotiate the same in the market; and power was given to the town authorities to levy and collect such taxes as might be necessary to pay accruing interest, or pay the principal sum.

Now, under the law as above stated, the town, 20th November, 1869, voted to *donate* to the C. D. & V. R. R. Co., the sum of $25,000, provided the company should do certain things, which the case finds it did do before the bonds were issued. (Printed record, pp. 11 and 13.) Both acts require the amount of the appropriation or donation to be raised by taxation, but the act of 1869 allows bonds to be issued in the first instance.

It is claimed that because the act of 1867 says nothing about bonds, and the act of 1869 does; and that because the people voted to levy the tax for $25,000 in *two years*, *therefore* the act must have been done solely under the law of 1867.

In answer to this claim it may be said, that the voters do not specify which particular two years the tax shall be levied in, nor whether the same shall be two consecutive years. It is still in the power of the town authorities to levy the tax to pay the principal sum in two years, and that, in the *last* two years of the bonds. Again: the vote, so far as it relates to taxation is *surplusage*. The statute regulated that. The power to levy and collect the taxes is given entirely to the "town authorities," after the aid is once voted. All that the voters are authorized to do or not to do, is to vote to give or not to give the aid.

This claim is a mere technicality. There is no evidence or presumption that a dollar has ever yet been raised by tax-

ation in this town to pay this donation. The *power* existed to do the very thing that was done, and if not done just in accordance with the vote of the town, it is nothing more than a defective execution of the power, and so does not affect *bona fide* holders of the bonds.

It is also claimed that because the recital in the bond recites the *title* to the act of 1867, and not the title to the act of 1869, *therefore* the town acted under the former law only, and so could not issue bonds. If this argument was not gravely and at some length insisted upon, the presumption would inevitably be that it is not made in earnest The answer to it is, that the act of 1869 was in full force. That it provided specially and precisely for the very thing which was done. There is not a word or a sentence in the notice calling the voters together, or in the ballot they cast, tending to show they were, or thought they were, acting under anything less than the *whole* power given them by the statutes. No *mere recital* in a bond can limit their act, or assign it to any power less than the whole that existed.

Another claim made is to the effect that the town voted $25,000, and the town authorities, disregarding the vote, made the town assume an obligation of $50,000. This claim, surely, cannot be credited with seriousness. It is sufficient to say, that the bonds were issued only for the amount voted, and that the *time* and *rate* of *interest* are fully authorized by section 4 of the act of 1869.

The two authorities cited—Marshall *vs.* Silliman, 61 Ill., and Loan Association *vs.* Topeka, 20 Wall.—can have no bearing on the question at issue, because in both of these cases there was no power at all to contract the obligations.

The cases of Schall *vs.* Bowman, 62 Ill., 321, and Richards *vs.* Donaghs, 66 Ill., 73, cited by the plaintiff, decide one single fact only: that the clause of the constitution of 1870 prohibiting towns, &c., from granting aid to railroads went into force on the 2d day of July, 1870, and that aid voted

after that date was void. The cases do not have the slightest bearing in any way on the question at bar.

This brief is submitted in addition to the one heretofore filed by us on the re-argument, and in order to be the most intelligible as a reply to those filed for the plaintiff in error, should be read and considered first.

ISAAC G. WILSON,
SANFORD B. PERRY,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1875.

TOWN OF CONCORD,
Plaintiff in Error,

vs.

THE PORTSMOUTH SAVINGS BANK,
Defendant in Error.

No. 43.

Brief for Defendant in Error

ON

RE-ARGUMENT.

ISAAC G. WILSON,
SANFORD B. PERRY,
For Defendant in Error.

CHICAGO:
JAMESON & MORSE, PRINTERS, 162 & 164 CLARK STREET.
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THE PORTSMOUTH SAVINGS BANK,
Deft. in Error.
No. 43.

Brief for Defendant in Error on Re-Argument.

I.

On the 13th day of December, A. D. 1869, when the last Constitutional Convention of the State of Illinois convened, there were in force in that State, three classes of Legislative acts, general, local or special, under which municipal corporations were authorized to grant aid to railroad corporations, of which the following are samples:

(*a.*) *Subscriptions for Stock*, as authorized by the general law of 1849, cited in *Johnson* vs. *County of Stark*, 24 Ill., 83.

(*b.*) *Donations*, as authorized by the statutes having a local operation, which are quoted in the argument for the defendant in error, heretofore filed herein, pp. 3 to 6.

(*c.*) *Loaning Credit*, as authorized by the Special Charter of the Kenosha and Rockford Railroad Company, cited in *Robertson* vs. *City of Rockford*, 21 Ill., 452.

It is a matter of public history, that in the judgment of many of our best citizens, an improvident use had been made of this authority—and to check which, the constitutional prohibition was adopted in 1870.

II.

It will be observed that the prohibitory article of the constitution is framed to expressly cover *all* the modes authorized by the legislature for granting municipal aid to railroads.

The "Debates and Proceedings" of said constitutional convention show, vol. 2, p. 1103, pp. 1234 to 1242, and p. 1730, the whole history of this Article.

On the 10th of March, 1870, the main body of the article was introduced into the convention, and the same, as subsequently amended and adopted is as follows:

No county, city, town, township or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation.

On the 13th of April, 1870, (p. 1240,) Mr. Hay, of Springfield, offered, as an amendment thereto, the *proviso*, which makes a part of the article, as follows:

Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make *such subscriptions* when the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption.

In offering this amendment, Mr. Hay said:

I offer this amendment for the reason that I apprehend much embarrassment might arise as to the application of the proposed provision of the constitution, (if it should be adopted,) growing out of *existing contracts*, and existing relations that have been entered into prior to the adoption of this article. Now the practice, so far as I am aware, has been to obtain the votes of counties or cities to *aid* railroads, and when that has been given, the subscriptions are made, and the bonds of the corporation issued when the railroad is completed through the county or city. In some places these subscriptions are never made until the railroad is actually completed to or through the corporation.

Now many of these railroad corporations have entered into contracts upon the faith of obtaining this subscription as soon as a road shall be completed; and the amendment I propose is to give to corporations the right to fulfill these obligations, and thus save embarrassments that might arise out of the adoption of the article, unless that provision were inserted.

The *proviso* was thereupon adopted without further or other discussion.

It will be observed, both from the *proviso* itself, and from the remarks of Mr. Hay,

(*a.*) That this amendment was intended to be as broad and as comprehensive as the article of which it was to be a part. That it was designed especially to prevent embarrassments where railroad corporations had entered into obligations upon the faith of *aid* voted by municipalities. That the mischief he sought to prevent would be equally great, whether the aid voted was a subscription for stock, for a donation, or for a loan of credit.

(*b.*) That it did not *in terms* select to be saved from the operation of the body of the article, either one of the three modes of aiding railroads, then authorized by law, to the exclusion of the other two: as if it had been the intention of the convention to save subscription for stock *only* and *not* subscriptions for donations or for loan of credit, it would have said just that, and thus excluded the others by the use of direct and appropriate language.

(*c.*) That it must have been the understanding of the convention that the amendment was intended to be as broad and comprehensive as the body of the article, is inferable from the fact that no objection was made to it. If it had been supposed that subscriptions for donations, or for loans of credit, already numerously voted in aid of railroads in various parts of the State, were not saved by and included in the amendment, as well as subscriptions for stock, it cannot for a moment be presumed that members representing interests to be prejudiced, perhaps ruined thereby, would have remained silent.

(*d.*) That as the objects sought by all three modes of aiding railroads were precisely the same, there can be no good or valid reason suggested *why* the convention should favor the one mode and exclude the others; especially as by so doing, purely arbitrary distinctions, wholly unfounded in reason and in the nature of things, would be made, prejudicial to the interests of many persons,

and municipal and railroad corporations, who had in good faith entered into contracts on the strength of promises made by votes already taken.

(*e.*) That if it had been the object of the mover of the amendment to make so important and remarkable a distinction as that sought to be enforced through this court, it is incomprehensible that he should not have stated it, or that some members of the convention should not have discovered it.

(*f.*) That there was no reason, in fact, for including in this amendment subscriptions for stock, and excluding subscriptions for donations or for loans of credit, upon the supposed ground that there is a *consideration* for the one mode of aiding a railroad, and not for the other modes. The Supreme Court of the State of Illinois, in *C. D. & V. R. R. Co.* vs. *Smith*, 62 Ill., 277, has well and truly said that the distinction between these modes of aiding railroads is "*more apparent than real; indeed, entirely shadowy.*"

The said court in the same case, (p. 274), has very forcibly stated the *quid pro quo* for *donations* made in aid of railroads in pursuance of the very statutes under which the bonds in question were issued, as follows:

> The benefits resulting to the people of the State from our system of railroads, are untold and incalculable. The mind can scarcely grasp them. Railroads have almost superseded all other means of inter-communication between the several parts of our extensive and growing State. They have become an absolute necessity, indispensable to our increased growth, and to the removal of our immense surplus. They have added millions to our taxable property; given augmented facilities to every department of trade; enriched the masses of the people; largely enhanced the value of our lands; built up manufactures, and brought us into close proximity with the best markets of the country.

(*g.*) That the very people who by vote authorized the issuing of the bonds in question, understood the words "subscribing" and "subscription" to have the same meaning, in this connection, as that contended for herein; for in an election held by them on the 30th day of June, 1870, two days before they voted on this consti-

tutional amendment, and under the authority of the very same acts by virtue of which they voted the bonds in question, they voted "for or against *subscribing* twenty thousand dollars to the Kankakee and Indiana Railroad Co.," the same to be paid in township bonds "in full of said subscription." This was a clear vote to *subscribe* twenty thousand dollars as a *donation.*

See "notice," etc., cited in the argument for plaintiff in error, pp. 6 and 7.

(*h.*) That a State constitution is a limitation upon, and not a grant of legislative power. The constitutional inhibition must be clear and express, and not left to presumption or inference. What is not clearly and expressly prohibited, remains. In a case that even fairly admits of a doubt, the benefit of that doubt is always given to the legislative power. To be rendered void, the act done should be seen to be in plain and obvious conflict with the constitution. The opposition between it and the constitution must be clear and strong. The infringement must be evident. In the language of Chief Justice Marshall, in *Fletcher* vs. *Peck*, 6 Cranch 87, "The question whether a law be void for repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. * * * The opposition between the constitution and the law should be such that the judge feels a *clear* and *strong conviction* of their *incompatibility* with each other."

C. D. & V. R. R. Co. vs. *Smith, supra.*

(*i.*) That the same rule of construction, applied to a question involving a supposed conflict between a constitution and a legislative act passed while the constitution is in force, should be applied to the acts and contracts of persons lawful under existing statutes, but supposed to be prohibited by a constitution adopted subsequent to the enactment of those statutes.

III.

It is not disputed that the vote of 20th Nov., 1869, was in favor of a donation of $25,000 to the Chicago, Danville & Vincennes Railroad. But it is claimed that this vote was rescinded by the vote of 30th June, 1870. This claim, it is confidently submitted, is without the slightest foundation in fact, if the ordinary force and meaning is to be given to language; because, by the very words of the ballot used at the second vote, the donation therein contemplated was only to be *in lieu* of that first given, *on condition* that certain things should be done which never were done. The ballot did not use the word rescind at all; but if it should be held that the ballot related back to the notice, and in legal effect spoke all that the notice contains, even *then* it rescinds nothing, for the notice itself did not contemplate a rescinding of the former vote only upon condition that certain things should be done which never were done. There can be no pretence that voters, so anxious for a road as to incur the expense of voting aid to two different roads, had any desire or intention to give up the first road if they did not get the second; and not getting the second, but getting the first on the faith of their vote, they, in their honesty and simplicity kept their part of the compact, issued their bonds, and consummated their donation in pursuance of their vote. It never occurred to them for one moment that they had *rescinded* any thing. What a surprise it must have been to them to be informed that they had done what they had never contemplated!

IV.

The donation made under and by virtue of the vote of 20th Nov., 1869, coming, as we have shown, within the *proviso* in the constitutional amendment, the power to issue the bonds was complete under the statute authorizing the donation. It is but an incident of the power to donate. And when the power to do the main thing is retained, all the incidents connected therewith, necessary to the execution of the power given, are retained also. It

cannot be seriously claimed that although the power to donate may be retained, yet the means by which the donation is to be made, if at all, are taken away!

The act of 24th March, 1869, cited at length in the argument for the defendant in error, heretofore filed herein, shows, pp. 4 and 5—

(*a.*) That power was given to the town to make the donation in aid of the construction of the railroad. (§ 2.)

(*b.*) That the amount which should be voted in such aid, should become due and payable *as soon as said railroad should be completed*, etc. (§ 5.)

(*c.*) And that the town authorities were authorized to *borrow money* to meet such contribution, and *issue the bonds of the town* therefor, and *negotiate* the same on such terms as they might deem advisable, and to *levy* and *collect taxes* to pay the interest and principal. (§ 4.)

The *meaning* of the *vote* was simply that the town would make the donation, and was willing to be taxed therefor; the details of the whole having been substantially regulated and provided for by statutes.

The bonds of the town were made after the railroad was completed, were made payable to *bearer*, and *bona fide* purchasers, finding them on the market, might conclusively presume, under the repeated decisions of this court, that they were put upon the market and negotiated by or under the direction of the town authorities, for the very purpose provided, and under the very authority given, in section four above referred to.

V.

But again: it is submitted that the amendment of the constitution above referred to, *did not* prohibit the issuing of the bonds in question, for the reason that it only relates, by the natural construction of the language used, to obligations to be entered into *after* its adoption. It says, "No town &c. shall *ever become* subsubscriber * * , or *ever make* donation to, a railroad." This

language is prospective solely. It does not, by any reasonable construction, undertake to prohibit or declare void what had already been done, either in whole or in part. The donation of the aid, represented by the bonds in question, had, by vote of the town, already been made—was made even before the assembling of the convention.

This constitutional prohibition cannot be given a retroactive effect, without giving a construction to the language used which is forced and unnatural, and which is not demanded by the subject matter. The rule of construction is well settled that statutes and constitutions are not to be construed as retrospective in their operation, unless by the language thereof, they are clearly intended so to be: and when the effect of such a construction would be to *destroy vested rights*, or *impair the obligation of contracts*, the construction *must be* prospective.

VI.

The record in this case (p. 11) shows that the town of Concord, at a meeting of its legal voters duly called and held 20th Nov., 1869, voted to donate to the Chicago, Danville & Vincennes Railroad, $25,000, provided the company would run its road through the villages of Concord and Sheldon: that on the 20th day of June, 1870, the railroad company filed with the clerk of the town its written acceptance of the donation: that the railroad company thereupon built its road as provided in said vote: that when the bonds were issued, 9th Oct., 1871, an official record of the fact that the railroad company had run its road through the villages of Concord and Sheldon, in accordance with the vote of the town cast 20th Nov., 1869, was entered upon the town records by the town clerk and supervisor, the "town authorities."

The act of the town in *making* the *donation*, and the act of the railroad company in formally *accepting* it, clearly and unqualifiedly make a contract between the parties, entered into and per-

fected *before* the adoption of this constitutional amendment; a contract obligatory on both; on the one to construct the road, and on the other to pay the money donated. The construction of the road by the railroad company, in pursuance of the vote of the town, was the performance and consummation of the contract on the part of the company, and the delivery of the bonds to the company by the town authorities, was the performance and consummation of the contract on the part of the town.

The building of the road, and the issuing and delivery of the bonds without objection from any taxpayer of the town, was a practical and natural construction given by the parties themselves to their own contract, and shows conclusively their mutual understanding of the nature and obligation of the contract into which they had entered.

Now, if this court shall, under the rules of construction, feel compelled to say that this constitutional amendment must receive such a construction as to give it a retroactive force, and that giving it such a force, its language must be held to prohibit the issuing of the bonds in question, *then* the constitutional amendment must be held to be *inoperative*, for the reason that it clearly *impairs the obligation* of the contract, entered into before its adoption, between the town and railroad company, as above stated, and so comes within the prohibition of the Constitution of the United States.

Dodge vs. *Woolsey*, 18 How, 331.

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